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No. 90-1653

In The

Supreme Court of the United States

October Term, 1991

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP,

Petitioner,

vs.

CITY OF ST. PAUL and CONTINENTAL CABLEVISION OF ST. PAUL, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX – VOLUME I

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THE QUESTIONS PRESENTED

1. Should this Court conduct an independent review of the record to determine whether clear and convincing evidence exists to support findings that, despite the defendant City's admission that petitioner Nor-West was a cable television operator similarly situated with the monopoly franchise holder, Nor-West lacked standing to assert prior restraint violations of its rights to speak and to publish?

2. Should this Court make whatever determinations are necessary, based on the fully developed record, to define a municipality's powers to restrict competition in the cable television field?

3. Should this Court, in an area the District Court and the Court of Appeal declined to enter, make rulings about which, if any, municipal exactions as conditions for the right to speak and publish by cable are constitutionally permissible?

4. Should this Court clarify the principles expressed in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S 488 (1986) and *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S 485 (1984), principles which have led to inconsistent rulings and requests for guidance from the lower courts?

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IDENTIFICATION OF DISMISSED PARTIES

The District Court dismissed Continental Cablevision of St. Paul, Inc. and Kalba Bowen Associates, Inc. from this litigation.

OPINIONS BELOW

After Nor-West filed a complaint on September 2, 1983 (Appendix 9), followed by an amended complaint in March, 1984 (Appendix 10), the District Court dismissed all causes of action. (See Appendix 4; Appendix 5) The Court of Appeals for the Eighth Circuit remanded the matter. (See 802 F.2d 462 and Appendix 6) On remand, the District Court allowed Nor-West's First Amendment and Equal Protection claims to proceed. (Appendix 6)

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit (924 F.2d 741), which was filed on January 25, 1991, is printed at Appendix 1. The District Court's Order For Judgment, dated September 1, 1988, is printed at Appendix 2. The District Court's Order of February 27, 1989 is printed at Appendix 3.

JURISDICTION

The jurisdiction of the District Court is based on 28 United States Code sec. 1331, arising from plaintiff's claim under 42 U.S.C. sec. 1983. The jurisdiction of the Court of Appeals is based on 28 U.S.C. sec. 1291. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article III (Appendix 7), First Amendment (Appendix 8).

THE RELIEF REQUESTED AND ITS BROADER EFFECT

Petitioner (Nor-West) requests this Court to:

1. Conduct an independent review of the record, which included an admission that Nor-West had standing as a cable television operator, to determine whether clear and convincing evidence exists to support findings that Nor-West *lacked* standing to assert a prior restraint violation of its First Amendment rights; and

2. Make whatever determinations are necessary to define a municipality's powers to restrict competition in the cable television field; and

3. Make rulings about which, if any, restrictions are unconstitutional; and

4. Reverse the Court of Appeals' judgment; or

5. Remand this matter for an independent review by the District Court or the Court of Appeals to determine the same issues, with guidance from this Court.

If granted, the relief sought would clarify principles established in:

a. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); and

b. *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

(*See, e.g., Pacific West Cable Co. v. City of Sacramento, Cal.*, 675 F.Supp. 1322, 1327 (E.D. Cal. 1987) ["The court is

especially concerned about the possibility of legal errors in this case inasmuch as the Supreme Court has explicitly declined to decide the legal issues raised by cable television franchising in the absence of a fully developed factual record"].)

STATEMENT OF THE CASE

The St. Paul, Minnesota City Council and the City's voters have disagreed over the City's role in the cable television field. After a 1979 task force determined how cable services could benefit the City, city officials invited proposals from private companies hoping to obtain a franchise. Seven companies responded – only to be rejected when the City decided to operate its own system. (Appendix 11, RT 2029, 2055, 2140-42, 2170, 2173, 2418-19, 3532) The plans for a municipal cable authority, however, were defeated at the general election. (Appendix II, RT 2029, 2055, 3532)

Having been denied full control over cable television activities, the City issued a new Request For Proposals (RFP) on November 1, 1982. (Appendix 12) The Mayor described those proposals, as follows:

> "[B]id specifications should be the most demanding in the country. St. Paul should be . . . a national model of utilizing municipal cable applications through the private franchising process. We are all aware of the budget crunch." (Appendix 11, RT 4270-71)

From 1982 onwards Nor-West Cable Communications Partnership (Nor-West) nevertheless tried to provide cable television services to the city's viewers. In doing so, Nor-West initially had to choose between complying with an apparently unconstitutional monopoly franchising

scheme or instituting litigation. Up to and including the present moment, no one has received judicial guidance on what restrictions, if any, the City constitutionally may impose on cable television First Amendment speakers.

The City's 1982 Request For Proposals (RFP), though couched in terms of a non-exclusive franchise, provided in practice that the winning franchise would be exclusive, regardless of whether Nor-West was willing to accept a non-exclusive franchise. (Appendix 10; Appendix 12) As the City's attorneys interpreted the situation, the franchise granted to Continental was considered non-exclusive only because: "The City has reserved its right to grant one or more additional franchises at such time, if ever, as it might wish to do so." (Appendix 13)

(Such a variance between language and effect has been judicially recognized. *See Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 712, fn. 1 (8th Cir. 1986) ["Although the franchises at issue in this case were nominally termed 'nonexclusive,' they were, in practical operation, exclusive."])

A document of more than 200 pages, the RFP governed all aspects of the cable television process, from the applicants' character qualifications (Appendix 12, p. 7), to the use of local talent (Appendix 12, p. 22), to the "high priority" the City placed on services which "will contribute to the overall efficiency and cost-effectiveness of City and other government services." (Appendix 12, p. 26) The City also emphasized its interest in being paid by First Amendment speakers. After stating that it had established an initial franchise fee of five percent on all gross annual receipts, the city added that:

> "Applicants should clearly indicate whether they will be willing to support an effort by the City to obtain a waiver of the franchise fee

> limits required by the Federal Communications Commission (FCC). * * * The City is also interested in exploring other forms of compensation, beyond the franchise fee. Applicants are encouraged to be creative in proposing innovative approaches for the City to generate revenues as a result of cable development in St. Paul." (Appendix 12, pp. 9-10)

Encouragement for "creative," "innovative" ways of taxing free speech was the apparent keystone of the selection process.

Rather than begin its operations in an adversarial manner, Nor-West applied for a franchise on the terms which the City had established. (Appendix 10, Appendix 14) So impressive were Nor-West's qualifications, as compared to Continental and one other applicant, that the City Council voted on June 30, 1983 to award the franchise to Nor-West. The Mayor, however, vetoed that award. (Appendix 11, RT 63-64, Appendix 10) On reconsideration, the Council awarded the single franchise to Continental. (Appendix 1, p. 2)

The City then barred Nor-West from offering its programming to the residents, even when Nor-West made serious efforts in late 1983 to obtain permission to place its cables on public utility poles. (Appendix 11, RT 702-703) Continental alone was provided with official sanction to install cables within the City limits, despite the fact that Nor-West had already spent more than $265,000.00 in complying with the City's conditions. (Appendix 2, p. 3) (Nor-West could have spent all reasonably necessary amounts, with funds drawn from Nor-West's partners' net worth of approximately $76 million dollars. (Appendix 11, RT 47, 2556))

Finding a forum in which to obtain a remedy was difficult. (By an express admonition, the District Court

informed the trial jury that neither the Cable Communications Board nor the Minnesota Supreme Court had resolved the relevant constitutional issues. (Appendix 11, RT 254))

Nor-West addressed the constitutional issues in the present federal litigation, which originally named the City as the sole defendant. (Appendix 9) At Continental's request, the District Court permitted Continental to appear as a defendant in intervention. (Appendix 15) Nor-West filed an amended complaint, adding Kalba Bowen Associates, Inc., the City's franchising consultant, as a defendant and identifying Continental as a defendant in intervention. (Appendix 10, Appendix 17) The allegations justifying relief against Continental declared that, through an unlawful conspiracy, the defendants wrongfully had prevented Nor-West from operating a cable television system in the City. (Appendix 10, pp. 1, 7-9) By agreeing to pay all costs for the City's unconstitutional activities in keeping Nor-West and other potential competitors out of the market, Continental converted to its own use the constitutional rights of others to speak and to publish and had become the real party in interest in this litigation. (Appendix 17)

While this litigation was in its early stages, Nor-West, on December 5 and 28, 1983, again requested a non-exclusive cable franchise, which would have permitted Nor-West to compete with Continental. Nor-West wrote that: "Nor-West continues to offer to meet all of the lawful requirements, as well as to meet the lawful requirements contained in the franchise issued to Continental Cablevision." (Appendix 16)

The City rejected Nor-West's applications on the ground that Nor-West had challenged the validity of the

franchising process in federal court [i.e., Nor-West was seeking vindication of its constitutional rights]. "The City has confidence in the validity and integrity of its process," its attorneys declared, "but under the adversarial conditions created by your client [i.e., Nor-West] the City of St. Paul declines to consider the desirability of granting a franchise to Nor-West at this time." (Appendix 13)

The refusal to allow Nor-West to broadcast its message has characterized the City's position throughout this litigation, despite the City's formal admission of Nor-West's eligible status. As the District Court instructed the jury:

> "[T]he plaintiff [Nor-West] and Continental Cablevision are both members of a class of persons known as cable television operators and for purposes of the case it is alleged that the plaintiff and the cable – plaintiff and Continental Cablevision are similarly situated members of that class and that allegation in the complaint was admitted in the answer." (Appendix 11, RT 2029-2030)

Two months after Nor-West filed this litigation, the City and Continental entered into two separate indemnity agreements. (Appendix 17) The first agreement provided that Continental would hold the City harmless from any claim advanced as a result of the franchising procedures, the awarding of the cable communications franchise to anyone else or the failure to award the franchise to anyone else. (Appendix 17) The second agreement, dated November 14, 1983, contained similar provisions but added indemnification for damages as a result of Continental's operation of the franchise, or the enactment of the franchise ordinance or its amendments, or any procedures leading to the enactment. (Appendix 17)

At the City's insistence, and over Nor-West's objections, the trial court excluded evidence of the agreements. (Appendix 11, RT 5493-96)

After Nor-West filed this litigation, the District Court dismissed Nor-West's complaint. The Court of Appeals reversed the judgment in light of *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). On remand, the District Court allowed Nor-West to proceed, but only on First Amendment and Equal Protection claims. (Appendix 6)

Nor-West tried, unsuccessfully, to learn which of the City's restrictions, demands and conditions the District Court would treat as constitutionally valid. Knowing that information was essential before Nor-West could develop realistic plans for its proposed system. But despite Nor-West's lack of guidelines, a federal magistrate ordered Nor-West, in effect, to guess at what it was obliged to do. Despite Nor-West's contentions that it still did not know precisely which of the City's myriad requirements were lawful and that it would certainly obey those held lawful, the magistrate ruled that Nor-West:

> "is precluded from introducing at trial proof of any cable system or damages which does not fairly fall within the written expert submissions, which must be made in a timely fashion under the terms of the pretrial scheduling order . . . " (Appendix 18, p. 16)

The District Court affirmed these rulings. (Appendix 19; Appendix 20) On appeal, the Court of Appeals held that Nor-West was not prejudiced by the rulings and that, if there was prejudice, no reversible error had occurred. (Appendix 1, pp. 17-19)

Shortly before trial, Continental stated that it "does not intend to participate actively in the trial * * * and

therefore Continental does not intend to have counsel participate in the trial," subject to the District Court's approval. (Appendix 21, pp. 1-3) When the District Court suggested that Continental's counsel would be "kind of second chairing," Continental's attorney said, "We may or may not participate at all, Your Honor." To the court's suggestion that Nor-West did not care if "they come or don't come," Nor-West's attorney answered, "That is exactly right." (Appendix 22, RT 2)

Nor-West, however, insisted that Continental was and should remain a *party*, subject to damages. As Nor-West asserted, "By intervening, Continental made itself vulnerable to complete adjudication of the issues between it and Nor-West, including damages." (Appendix 23) Even so, the District Court permitted Continental to withdraw. The court later stated that Nor-West had not sought injunctive or monetary damages from Continental (despite conspiracy allegations which would have made Continental answerable) and that the jury's finding of "no damages" rendered Nor-West's arguments moot. (Appendix 3, p. 2, fn. 2)

The jury trial took eight weeks. As the District Court characterized the proceedings, the litigation was ably tried and hard fought. However: "The lack of law in the area provided continuing obstacles for the court as well as the parties." (Appendix 3, p. 2)

From Nor-West's perspective, the lack of legal guidance meant that Nor-West did not know and could not learn what type of system the City constitutionally could require Nor-West to build. Despite repeated requests for the District Court to identify the controls which the City could impose on Nor-West's plans, the court required Nor-West to commit itself in advance of this knowledge.

Nor-West had to say what it wanted to build before knowing what it would be expected to build or even allowed to build. (Appendix 11, RT 5750-51, 5753; Appendix 24, RT 5-7; Appendix 25, RT 15-18, 21-22, 34-35, 64-65, 174-177; Appendix 26, RT 3-4, 11-13, 23-25, 32)

A clear instance of the dilemma caused by the District Court's refusal to commit itself to constitutional standards was Nor-West's ignorance about the minimum size of an acceptable system. Although the City had demanded that the companies responding to the RFP provide universal service, i.e., cable availability for each of its residents, the court never told Nor-West (or the jury) whether such a requirement could lawfully be imposed upon a competing system built by Nor-West. Instead, Special Verdict question 16 asked, "Does St. Paul have a substantial interest in ensuring the availability of cable television service to all St. Paul residents?" The jury answered, "Yes." (Appendix 2, p. 3)

The absence of geographical guidelines prevented Nor-West from developing any realistic allocation of its financial resources. Under circumstances where cable television speakers are linked to their audience by individual hook-ups, the greater the system's size the greater the expense to build it. Similarly, the City's requirements to provide subsidies to "public access" programming, to set aside channel capacity for such programming, to construct a "dual cable" rather than single cable system, and numerous other requirements, when viewed together, vastly increased the potential cost of a competitive system. If one or all were held invalid, costs would drop significantly.

Moreover, the greater the use of overhead wires in constructing a cable system, as compared to underground

cables, the lower the expense and the less the disruption. To what extent, therefore, was the City acting lawfully when it demanded expedited underground construction in the downtown area so that City Hall would have early cable access? Could such expensive construction be required of a *second* system? (See Appendix 11, RT 3486-87, 4340; Appendix 27; Appendix 28)

Nor-West's "plan" for its cable system was to comply with all lawful requirements but to save the expense of complying with the City's unconstitutional demands. Regrettably, the trial court never ruled which requirements were lawful and which were not, yet asked the jury to decide whether Nor-West could afford to construct the system it "requested permission to build."

Over Nor-West's objections – and with a clear statement from the District Court that Nor-West had *not* waived its first line position – the District Court submitted special verdict questions to the jury. (Appendix 11, RT 1764; Appendix 25, RT 103, 160) All the questions (dealing with subjects like Nor-West's readiness, willingness and ability to build a cable television system) were presented *without* constitutional guidelines identifying which of the City's requirements were lawful and which were unlawful. Like Nor-West itself, the jurors never were informed about what conditions, if any, the City lawfully could have imposed on Nor-West's proposed system.

As the District Court advised counsel in chambers:

> "I don't know if you [the attorneys] can tell them [the jurors] precisely what the effect of their verdict is going to be, vis-a-vis my balancing, because I don't think you know. I don't think any of us know." (Appendix 25, RT 161)

Lacking these guidelines, the jurors found that Nor-West was not ready, willing or able to build "the cable television system it has requested permission to build in competition with Continental Cablevision," either in 1983 or at trial time. The jurors also found that Nor-West had suffered no damages as a result of its having been denied permission to build and operate a system. (Appendix 2, p. 3)

Most significantly, the jury found that the public utility facilities and rights of way could safely accommodate more than one cable television system. (Appendix 2, p. 3) A claim of physical limitations therefore would *not* have justified excluding Nor-West from operating a system. (*See Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), affirmed 476 U.S. 488 (1986)) To date, however, no court has defined what requirements the City lawfully could have imposed on an operator who wished to utilize available space on existing utility poles.

The District Court adopted the facts found by the jury. Through an erroneous characterization of Nor-West's arguments, the court stated that Nor-West previously had urged that "all factual determinations made by the jury are binding on the trial court." (Appendix 2, p. 5) Nor-West, however, consistently had taken a different position. (Appendix 23, pp. 51-53; Appendix 24, RT 3-4) In its trial brief, Nor-West did say that, "when claims at law and in equity are joined and the legal claims are tried separately by a jury, the jury's verdict operates as a finding of fact binding on the trial court in its determination of the equitable claims." (Appendix 23, p. 51) But Nor-West expressly pointed out that this general principle was subject to a significant exception:

> "Of course, the Court's exercise of its equitable powers must be viewed in light of the principles of *Bose* . . . in the event of an adverse jury finding where, as here, First Amendment rights are in issue." (Appendix 23, pp. 52-53)

Nor-West specifically objected to submitting Special Verdicts 5, 6 and 7 to the jury, contending that they were equitable questions:

> "[A]ll three [special verdicts] deal with the question of whether the Court is going to grant an injunction at this time and that is strictly a matter for the Court and the including of any facts involved in that, there is nothing that the jury can do for that matter that would amount to anything that would be binding on the Court so the only potential it would have would be to create a conflict between an advisory finding of the jury and the finding by the Court." (Appendix 24, RT 3)

To Nor-West's prejudice, however, the District Court overlooked Nor-West's explicitly-declared position when the court subsequently noted that:

> "Because the plaintiff insisted earlier that the jury verdict on the legal issue was binding on the trial court's determination of the equitable claims, the court is bound by the jury's findings. Further, the court chooses to be bound by the jury's findings. Finally, the court adopts such findings as the facts in this case." (Appendix 2, p. 5)

Based on findings that Nor-West was not ready, willing and able to operate a cable television system, the District Court held that Nor-West "was not and is not a cable operator entitled to First Amendment protection. Simply stated, the plaintiff lacks a legally protectable interest." (Appendix 2, p. 8) (The court thus ignored the City's *admission* that Nor-West *was* a member of "a class of persons known as cable television operators" and was

"similarly situated" with Continental. (Appendix 11, RT 2029-2030)) The court added that even if Nor-West had standing, it had suffered no damages. (Appendix 2, p. 8)

Although Nor-West could have recovered the $265,000.00 it spent in pursuing a franchise if the RFP were ruled unconstitutional, the District Court declared that Nor-West lacked standing to challenge the ordinance's constitutionality. Accordingly, Nor-West could not recover its expenditures. (Appendix 2, p. 9)

The District Court declared that even if it had been required independently to review the jury findings which were unfavorable to Nor-West's exercise of First Amendment rights, the court in effect had done so "by specifically choosing to adopt the findings of the jury as the facts in this action." (Appendix 3, p. 5)

The District Court rejected Nor-West's contention that the jury was forced to operate in a constitutional vacuum in answering the special verdict questions and that the jury could not properly have answered the questions without instructions on what kind of system Nor-West was legally required to build. (Appendix 3, p. 5) The court also rejected Nor-West's argument that the jury should have been instructed on what the result would be, depending on which of the City's defenses they found to exist:

> "The court considered plaintiff's request in this regard, but could find no way to instruct the jury in the manner now suggested. Even the plaintiff was unable to divine a way to instruct the jury on how the court would make such a determination based on the number of potential results the jury could have reached." (Appendix 3, p. 6)

On appeal, the Court of Appeals held that the District Court was not required to provide a de novo review of

the jury's special verdict answers. (Appendix 1, p. 8) But if the District Court had been required to do so, "it may be that the district court engaged in such review." (Appendix 1, p. 8, fn. 3)

With respect to its own obligations, the Court of Appeals noted that:

> "[T]he district court's factual determinations in this case involve the procedural issue of standing. . . . [E]ven in a first amendment case, factual determinations related to standing should be reviewed under the 'clearly erroneous' standard." (Appendix 1, p. 9)

Concluding that the District Court's findings were not clearly erroneous, the Court of Appeal affirmed the ruling on standing. (Appendix 1, pp. 9-11, 13)

> "Because Nor-West was not willing or financially able to compete with Continental, we find that Nor-West was not likely to benefit from the grant of a second franchise in this case, and therefore lacked standing." (Appendix 1, p. 14)

The Court of Appeals, however, did *not* address the jury instruction that Nor-West and Continental were both members of the class of persons known as cable television operators and were "similarly situated." (See Appendix 11, RT 2029-2030)

The $265,000.00 which Nor-West spent in seeking a franchise was deemed unrecoverable. (Appendix 1, p. 17)

To the Court of Appeals, Nor-West suffered no harm from the trial court's refusal to rule on which, if any, of the City's demands could be imposed on Nor-West:

> "Thus, the question of what system the City would have required Nor-West to build is beside the point, and Nor-West lacks standing even if the district court should have instructed the jury to determine what system the City should have required Nor-West to build." (Appendix 1, p. 20)

The Court of Appeals found no error in the District Court's having dismissed Continental as a defendant. Since Nor-West lacked standing to sue the City, "it also lacks standing to sue Continental." (Appendix 1, pp. 22-23)

In summary, after the jury was presented with special verdict questions without constitutional guidelines, neither the District Court nor the Court of Appeals independently reviewed the record to see whether sufficiently persuasive evidence existed to justify a denial of Nor-West's First Amendment rights. The absence of an independent review was especially troublesome since the jury apparently viewed the evidence contrary to the judge's instructions, i.e., without giving full effect to the City's admission that Nor-West and Continental were "similarly situated" members of the class of cable television operators.

REASONS FOR GRANTING THIS PETITION

This Court should grant Nor-West's petition for several inter-related reasons:

1. Based on extensive discovery proceedings and an eight week jury trial, the present case offers the necessary record to allow a formulation of national policy in an area where lower courts often have made questionable and inconsistent rulings.

Through extensive discovery proceedings and an eight week jury trial, the present record clearly depicts the stress in cable television dissemination between municipal franchising, technological innovations and First Amendment rights. As a result, this Court now has a

factual basis on which to analyze the problems of how a city's exercise of its regulatory powers inhibits the electronic press from contributing to the commerce of ideas. What this Court sought in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986), i.e., a fully developed record, has been established here. By utilizing these facts, this Court can provide authoritative guidance in an area of continuing tension between the exercise of municipal police powers and the enjoyment of First Amendment rights. Especially helpful is the jury's finding that the City's public utility facilities and rights of way were able, by reasonable rearrangement, to accommodate more than one cable television system.

Cable television systems have expanded so greatly in the past few years that an estimated 91 percent of American homes now have access to those services. Industry statistics indicate that 58% of households with television sets presently subscribe to cable services, representing a majority of the potential viewing audience. (See Paul Kagan Associates, Inc., The Kagan Cable TV Financial Databook, p. 10 (June, 1990).) What sets cable television apart from the other major forms of the media is its ability, with a multiplicity of channels, to transmit a choice of programs to its audience, including direct observation of governmental processes and decision-making. By turning to their home screens, interested citizens may observe governmental process in action. The camera eye revitalizes the concept of a town meeting where the citizenry makes its own judgments about its elected or appointed representatives.

This Court therefore must be aware of the danger in allowing city officials whose activities come under scrutiny to control which cable system will be allowed to

observe – or turn away from – public affairs. Examples of how different courts have construed their constitutional obligations are plentiful.[1] Synthesizing, modifying, approving or disapproving these decisions is a task which only this Court can accomplish.

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[1] *See Preferred Communications v. City of Los Angeles*, 754 F.2d 1396 (9th Cir.1985), affirmed 476 U.S. 488 [a single cable franchising scheme violates the First Amendment if utility facilities can accommodate multiple systems]; *International Broadcasting Corp. v. City of Bismarck*, 697 F.Supp. 1094, 1097 (N.D. North Dakota 1987) [an exclusive grant of a cable television franchise to one applicant probably would have violated the other applicants' First Amendment free speech rights]; *Central Telecommunications v. TCI Cablevision*, 800 F.2d 711, 716, 717 (8th Cir. 1986) [changes in technology may require a different approach to franchising schemes; an applicant seeking an exclusive franchise had a protectable interest where the "natural monopoly" characteristics of the cable market justified the City in offering a de facto exclusive franchise to create competition for the market]; *Communications Systems, Inc. v. Danville, Ky.*, 880 F.2d 887, 892 (6th Cir. 1989) [based on state law grounds, the court recognized that where the market could not support two competing cable television companies, it was lawful to award only one non-exclusive franchise, leaving open the possibility of awarding additional franchises when appropriate]; *Warner Cable Communications v. City of Niceville*, 911 F.2d 634, 636-638 (11th Cir. 1990) [a cable television franchise holder has no First Amendment right to its original market, undiminished by competition from a city-owned system, although "the government may not speak so loudly as to make it impossible for other speakers to be heard by their audience"]; *Century Federal, Inc. v. City of Palo Alto, Cal.*, 648 F.Supp. 1465, 1467, 1471 (N.D. Cal. 1986) [the fact that the cable television market in a proposed service area is a natural monopoly does not justify greater governmental regulation of cable operators than would otherwise by allowed under the First Amendment; a monopoly franchise scheme is unconstitutional]; *Group*

(Continued on following page)

Both the trial and appellate courts declined to address these issues. However, if a company like Nor-West, with some $76,000,000.00 in net equity among its partners, which prosecuted this litigation through pretrial proceedings, multiple appeals and an eight week trial, can be held to lack standing at the end of trial, based upon verdicts entered in a constitutional vacuum, the litigation burden placed on a potential cable entrant is indeed extraordinary.

Five years have passed since this Court declined to resolve the monopoly cable franchising constitutional question due to a desire for a more fully developed factual record. In that five year period, no such case has been presented to this Court.

Nor-West suggests that this apparent calm conceals an ongoing crisis which is limiting competitive television services to the nation's viewing audience. Incumbent cable television operators, enjoying the benefits of a monopoly franchise system, profit from the restrictive

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(Continued from previous page)

W Cable, Inc. v. City of Santa Cruz, 669 F.Supp. 954, 958, 961 (N.D. Cal 1987) [the policy of granting only a monopoly cable television franchise violates the First Amendment; conditioning the award of a franchise on the provision of concessions also violates the First Amendment, except for proof of financial responsibility and imposition of reasonable administrative and use fees]; *Pacific West Cable Co. v. City of Sacramento, supra*, 672 F.Supp. at pp. 1334-35 [generally speaking, a government created monopoly of a particular medium of communication is antithetical to First Amendment principles; if competition is feasible and sustainable, the impact of selecting a single cable television service provider and excluding all others has an "extremely significant effect on expression"].

policies. Similarly, municipal authorities have no incentive to raise an anti-competitive issue. *Only* excluded cable television applicants have a need to bring these constitutional issues before the Court.

Due to the historical monopoly status of cable franchising, many existing ordinances include requirements paid for by the incumbent operator's monopoly profits. The harmful effect of these practices has been clearly identified:

> "[T]he municipality uses the monopoly status of the cable system to extract revenue from households in the franchise area. Because federal law prohibits direct payment of this revenue in the form of municipal franchise fees, the municipality receives the payment in the form of facilities.
>
> "Ironically, although much of the public concern regarding the abuse of monopoly market power has been directed at the private firm, it is often the municipalities, charged with regulating the industry, that have wielded the market power." (Webb, Economics of Cable Television 179-180 (1983))

A prospective cable operator, such as Nor-West, not only must challenge the constitutionality of the City's decision to issue only a single franchise, but also must challenge individual requirements before developing an economically viable project. This is the self-fulfilling aspect of the "natural monopoly" argument asserted by the City and other municipalities to support a single franchise scheme. (Of course, *any* industry would yield similar results were government to install a monopoly provider and "regulate" it to siphon off the resulting monopoly profits.)

Since prospective cable entrants understandably do not know which franchise requirements will and will not

be ultimately upheld as constitutional, the prospect of long and expensive litigation is particularly daunting.

If the decision below is permitted to stand, attempts to resolve these constitutional issues may be thwarted. A prospective cable entrant will not only have existing barriers to contend with, it will face the prospect of incurring substantial litigation costs, only to find itself barred from the marketplace because a jury concluded that the entrant was insincere.

> 2. Because Nor-West was denied standing to assert its First Amendment rights against prior restraint as the direct outcome of unreviewed jury findings, this case should determine a) what standard of proof must a First Amendment speaker satisfy before being allowed to assert his rights, b) what testimony about the impact of monopoly franchising on journalistic freedom is the jury entitled to hear, and c) what obligations, if any, does either the trial court or a reviewing court (or both) have to independently review the record to see whether clear and convincing evidence existed to justify a denial of those rights.

Through several misconceived rulings, the District Court and the Court of Appeals justified a prior restraint on Nor-West's exercise of its First Amendment rights without ever evaluating the constitutional support for those rulings. The harm which Nor-West suffered from the lower courts' rulings may be divided into three areas – i.e., unfair burden of proof, exclusion of expert testimony on First Amendment pitfalls which affect the profession of journalism as the result of municipal franchising, and application of the standing concept.

a. The Unfair Burden Of Proof: After the City claimed power to screen prospective cable operators and award a

franchise to the system which most appealed to the City's subjective interests, Nor-West brought the present litigation to argue that a First Amendment speaker need *not* satisfy every demand the City had imposed. Nor-West, of course, recognized that some municipal controls could well be appropriate. (*See United States v. O'Brian*, 391 U.S. 367, 376) But Nor-West, in its dual capacity as a First Amendment speaker and a commercial enterprise, had to know which restrictions were valid *before* Nor-West could commit its financial resources to any given blueprint.

Since the City had admitted – and the District Court had so instructed the jury – that Nor-West and Continental were "similarly situated" members of the class of cable television operators (see Appendix 11, RT 2029-2030), Nor-West's need for early guidance was clear. Nor-West could marshall enough assets to enter the cable television field – but needed direction before completing its plans for any particular system.

Had the court ruled that the City's form of licensing of the press was an illegal prior restraint and declared a right of access to the market, subject to lawful police power regulation, Nor-West could have chosen to accept the approved regulations or to test them in a lawful way without risking the denial of its constitutional rights to speak and to publish.

Yet through the discovery orders, the District Court misused an otherwise neutral procedure. By preventing Nor-West's technical experts from developing plans which were based on realistic circumstances, i.e., on a list of judicially acceptable municipal demands or even a definitive list of the City's defenses, the court undercut Nor-West's commitment to service. (Would the periodic entanglement of tree roots and underground cables, for

example, be a proper basis for denying Nor-West a franchise?) Placed in that informational void, Nor-West's witnesses were unable to persuade the jury that Nor-West had the economic strength and technological skills to deserve a franchise. Nor-West's experts necessarily presented tentative and incomplete testimony.

The instructions let the jury decide what system Nor-West would have built – but included questions on whether the City had a substantial interest in "cable television service to all St. Paul residents" and "some cable television channels for public, educational and governmental access uses." (Appendix 11, RT 5751, 5753-54; Appendix 2, pp. 3-4) Whether universal service and public access requirements were constitutional or unconstitutional was left unsettled. Nor-West had to persuade the jury that the company could and would proceed to execute its plans, even though no one knew how small or how inexpensive a system would meet constitutional guidelines.

Predictably, the City could – and did – argue that the present lawsuit was a "complete fairly tale." (Appendix 11, RT 5523-25, 5531, 5542-43, 5546-48, 5607) But while cries for free expression may be fairy tales in other parts of the world, Nor-West's plea for First Amendment relief deserves a more appropriate response than the lower courts have provided.

Presumably assuming that the requirements for universal service, public access programming and other guidelines were constitutional, the jury never determined whether Nor-West could construct a competitive system over part of the City or a system without subsidizing public access programming for others' use. Quite simply, Nor-West was unfairly put in the position of playing a

guessing game with its constitutional rights. Either it guessed correctly about constitutionality, tailoring its "plans" to match precisely that end result, or Nor-West sacrificed its free speech rights.

Faced with a related situation eleven years ago, a District Court observed that:

> "It is not characteristic of utility regulation for the regulating authority to negotiate with those to be regulated and then formulate the final policy by exercising legislative power through an offer and acceptance mechanism. It might well be a different case if Boulder had enacted an ordinance articulating qualifying criteria for cable companies to do business in the City, with such other regulations as the City government might believe to be necessary and proper in the exercise of police power, and then to confront the contention that such an ordinance had an anticompetitive effect." (*Community Communications v. City of Boulder*, 485 F.Supp. 1035, 1039 (D. Colo. 1980), *reversed* 630 F.2d 704 (10th Cir. 1980), *reversed* 455 U.S. 40 (1982))

The *Boulder* court anticipated Nor-West's difficulties but felt that the "potential problems in this developing situation" were not then ripe for decision. Nevertheless:

> "The question, of course, is what are the limits of that authority? If controlling content of the programs is beyond those limits, is it different, either in degree or in kind, for the City government to prescribe the number, variety, and scope of programming and services to be offered? And, is it appropriate for the City administration to say that the acceptablilty of a cable company rests on its willingness to contribute free services to that government or to such institutions or groups as may be considered to be in need of benefit or reward? Stated bluntly, may the City exact tribute for its favors?" (*Community Communications v. City of Boulder, supra*, 485 F.Supp. at p. 1040)

The record in the present case presents a full-bodied opportunity for this Court to resolve the questions which have long-since passed the potential stage and have become actual, immediate, costly and troublesome.

b. *Testimony About Journalistic Freedom:*

Nor-West offered an expert witness to testify that allowing a city to practice monopoly franchising necessarily restricts journalistic freedoms. The District Court, however, excluded that testimony. (See Appendix 11, RT 854-57, 861-62, 869, 930-31, 2002-05, 5360-65, 5367, 5497-98) This exclusion left the jury ignorant of how would-be monopolists seek benefits from elected officials anxious for favorable publicity.

c. *Standing:*

The District Court and the Court of Appeals left substantive issues unresolved because the lower courts viewed the jury's special verdicts as a factual mandate for depriving Nor-West of its standing to assert First Amendment rights.

Article III gives federal courts jurisdiction only over "cases" and "controversies." Before a court may consider the merits of a legal claim, the person seeking relief must establish the requisite standing to sue. The standing concept, however, has been elusive, incapable of precise definition. What appears clear is that the litigant must have suffered an injury "in fact," requiring a "concrete," "distinct," "palpable," "actual" or "iminent" aspect. The injury must fairly be traceable to the challenged action and must likely be capable of redress by a favorable court decision. The plaintiff must show an essential dimension of specificity which informs

judicial decision making, not express a mere abstract concern about a problem of general interest.[2]

Measured against these guidelines, Nor-West qualifies for standing. When the City issued an RFP, it set the ground rules by which an applicant could compete for a cable franchise. Nor-West spent $265,000.00 in complying with the rules and obtaining favorable City Council action (subject to the mayor's later veto). By the RFP's own terms, the City's allowing Nor-West to compete established that the company satisfied all relevant criteria. The City expressly admitted – and the District Court so instructed the jury – that Nor-West and Continental were "similarly situated" members of the class of cable television operators.

For purposes of eventual standing in court, Nor-West thus established its participation in television franchising "in fact," an interest which was "concrete," "distinct," "palpable," "actual" and "imminent," rather than an abstract concern about a matter of general interest.

After being rejected, Nor-West applied for a non-exclusive franchise but the City refused to grant permission because "adversarial conditions" existed, i.e., Nor-West was seeking to vindicate its First Amendment interests in court. Few injuries could be more concrete than punishment for exercising constitutional rights. These

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[2] (*See Whitmore v. Arkansas*, 495 U.S. ___, ___, 109 L.Ed.2d 135, 144, 149 (1990); *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United For Separation Of Church And State*, 454 U.S. 464, 471 (1982); *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 260 (1977); *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 683; *cf. Whitmore v. Arkansas, supra*, 495 U.S. at p. ___, 109 L.Ed.2d at p. 147).

concrete injuries were fairly traceable – incontestably traceable! – to the City's unlawful actions, i.e.: The City established unconstitutional RFP procedures which restricted First Amendment speakers to a single franchise and refused to grant a competing franchise because Nor-West had exercised its First Amendment right to petition the government by instituting federal court litigation.

Through a favorable court decision, Nor-West's injuries most likely would be redressed. Nor-West could recover the $265,000.00 spent in complying with the franchising process; could recover damages from the City and Continental; and would be relieved of the prior restraints which prevented it from exercising its First Amendment rights.

The Prejudice Inherent In Judicial Reliance On The Jury's Special Verdict

Although the District Court recognized that the lack of legal precedents created continuing obstacles, the court brushed aside Nor-West's contention that jury findings were *not* binding if the findings impaired First Amendment rights. The Court of Appeals compounded the error by improperly distinguishing between First Amendment "substantive" and "procedural" issues. Nor-West realizes that an aggrieved party may *not* acquire standing just because no one else could acquire standing. (*See Schlesinger v. Reservists Committee To Stop The War,* 418 U.S. 208, 227 (1974)) What Nor-West contends is that it earned a place as a First Amendment speaker by satisfying rules the City itself had set to identify eligible cable companies. Allowing a jury to make the determinations which justify prior restraints places the First Amendment in an elastic frame. "Uncertainty as to the scope of the constitutional protection can only dissuade protected speech – the more elusive the standard, the less protection it

affords." (*Harte-Hanks v. Connaughton*, 491 U.S. ___, ___, 105 L.Ed.2d 562, 588 (1989))

No matter how fair, no matter how conscientious, no matter how open-minded six randomly-chosen citizens may be, they are inappropriate arbiters of our nation's organic law. They may *not* determine constitutional questions when they have been kept ignorant of what they really are deciding. Without guidelines from the court on what burdens constitutionally may be imposed on a First Amendment speaker, and what burdens are forbidden, the jurors have been set adrift in their search for facts.

As this Court declared in *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501:

> "[T]he rule of independent review [in First Amendment cases] assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge."

See also Harte-Hanks, Inc. v. Connaughton, supra, 491 U.S. at pp. ___, 105 L.Ed.2d at pp. 589, 592 [In determining whether the constitutional standard has been met, the reviewing court must consider the factual record in full; here, the evidence in the record, when reviewed in its entirety, was unmistakably sufficient to support a finding of actual malice]; *Houston v. Hill*, 482 U.S. 451, 457, fn. 6 ["An independent review of the record is appropriate where the activity in question is arguably protected by the Constitution"]; *Tavoulareas v. Piro*, 817 F.2d 762, 776 (DC Cir. en banc 1987), *cert. denied* 484 U.S. 870 (1987) [The correct standard of review is that: "Specifically, by virtue of the First Amendment nature of this litigation, the jury verdict must be measured, on the basis on an independent examination, against the heavy burden of proof imposed on a plaintiff who is a public figure"]).

To Nor-West's prejudice, however, neither the District Court nor the Court of Appeals independently reviewed the factual material which produced such constitutional impact.

This Court now has the opportunity to help lower courts navigate through what *Tavoulareas v. Piro, supra,* 817 F.2d at p. 777, called "uncharted waters":

> "The somewhat murky dispute that has consumed this litigation in its later phases is whether *Bose* went further and sanctioned independent review as to findings of underlying facts, evaluations of credibility, and the drawing of inferences. It is this issue – the existence and application of this possible additional aspect of *Bose* – that we believe, upon reflection, we need not decide."

See also Warner Cable Communications v. City of Niceville, supra, 911 F.2d at p. 637 [After the opinion in *City of Los Angeles v. Preferred Communications, Inc.*, "the full contours of a cable operator's first amendment right remain unshaped"].

Yet for Nor-West, a decision on those unresolved questions is the only means of assuring proper respect for First Amendment rights.

> 3. Where a franchise holder formally had intervened in the litigation between Nor-West and the City and had taken part in all pretrial and discovery procedures, this Court should rule on whether the franchisee may withdraw from the case on the eve of trial, over objections that the franchisee was seeking to escape from responsibility for its wrongful activities.

The Court of Appeals has declared that. "If, as we believe, Nor-West lacks standing to sue the City, it also lacks standing to sue Continental." (Appendix 1, pp. 22-23) But since Nor-West believes that it *does* have the requisite standing, this Court (or, on remand, a lower court) should determine whether the District Court properly allowed

Continental to avoid responsibility for its actions after Continental had voluntarily intervened as a party, participated in all pretrial and discovery matters, evaluated its interests, and decided to withdraw as a potentially liable conspirator.

Since Nor-West's amended complaint sufficiently identified Continental as being answerable in damages and since Continental had become the real party in interest, the trial court should have forbidden Continental from withdrawing. (Appendix 10) Continental should answer on the merits.

CONCLUSION

As a governing body, the City Council of St. Paul once voted to award Nor-West Cable Communications Partnership a franchise for cable television operations. After being named as a defendant in the litigation which Nor-West brought on First Amendment grounds, St. Paul refused to issue a franchise to Nor-West because Nor-West had sought judicial protection against prior restraint.

Neither the District Court nor the Court of Appeals in this case independently reviewed the record to determine that the jury's special verdicts contained clear and convincing evidence that Nor-West should be denied standing to assert its rights as a First Amendment speaker.

This Court should reverse the judgment against Nor-West and remand this matter for an independent review of the evidence and for all related relief.

Dated: April 22, 1991

Respectfully submitted,

HAROLD R. FARROW
Attorney for Petitioners

No. _____

In The

Supreme Court of the United States

October Term, 1991

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP,

Petitioner,

vs.

CITY OF ST. PAUL and CONTINENTAL CABLEVISION OF ST. PAUL, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX 1

COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5184

Nor-West Cable Communications Partnership, a general partnership,	*	
Appellant,	*	Appeal from the United States District Court for the District of Minnesota
v.	*	
City of St. Paul, A City of the First Class,	*	
Appellee,	*	
and	*	
Continental Cablevision of St. Paul, Inc.,	*	
Intervenor-Defendant Below,	*	
Appellee.	*	

Submitted: May 14, 1990

Filed: January 25, 1991

Before McMILLIAN, Circuit, Judge,
HEANEY, Senior Circuit Judge,
and ARNOLD, Circuit Judge.

McMILLIAN, Circuit Judge.

Nor-West Cable Communications Partnership ("Nor-West") appeals a judgment of the United States District Court for the District of Minnesota.[1] *See Nor-West Cable Communications Partnership v. City of St. Paul*, No. 3-83-Civ. 1228 (D. Minn. Sept. 1, 1988) (order for judgment) (*Nor-West I*). On appeal, Nor-West argues that the district court erred in upholding the jury's answers to various "special verdict" questions and in denying Nor-West's motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial. For the reasons stated below, we affirm.

I. Facts

In 1979, the City of St. Paul, Minnesota, issued a "request for proposals" (RFP) to companies interested in providing a cable television service to St. Paul. Although several companies filed proposals, the City decided to operate its own cable system. After the City's "municipal ownership" plan was rejected in a referendum, the St. Paul City Council voted to award a single, non-exclusive franchise to a private cable operator, and a new RFP was issued. Numerous companies filed proposals, including Continental Cablevision of St. Paul, Inc. ("Continental"), and Nor-West. The City Council passed a resolution awarding the franchise to Nor-West, but the Mayor of St. Paul vetoed the resolution, and the City Council then

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[1] The Honorable Donald D. Alsop, Chief Judge, United States District Court for the District of Minnesota.

awarded the franchise to Continental. This decision was affirmed by the Minnesota Cable Communications Board and by the Minnesota Supreme Court. *See Cable Communications Board v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658 (Minn. 1984).

On September 2, 1983, Nor-West filed the present lawsuit against Continental and the City (collectively "defendants"), alleging violations of due process, equal protection, the first amendment, and the Sherman Antitrust Act, 15 U.S.C. §§1, 2 (1988), as well as pendant state claims. Shortly thereafter, Nor-West's counsel requested that the City award a second, competing franchise to Nor-West. Defendants moved to dismiss, and the district court granted the motion. We reversed and remanded, ordering the district court to reconsider Nor-West's claims in light of a recent Supreme Court case. *See Nor-West Cable Communications v. City of St. Paul*, 802 F.2d 462 (8th Cir. 1986) (unpublished) (reversing and remanding case to district court), *citing City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) (requiring "thoroughly developed record" in first amendment cases).

On remand, the district court proceeded to trial on Nor-West's first amendment and equal protection claims, and dismissed Nor-West's other claims. After an eight-week trial, the district court submitted the case to the jury on special verdicts. The jury found that Nor-West spent $265,000.00 in seeking the cable television franchise, but also found that Nor-West was never willing, nor technically or financially able to build a competitive cable system, and that it was therefore not damaged by the City's failure to award it a second cable franchise.

In *Nor-West I*, the district court adopted the jury's factual findings, holding that it was both "bound [and] . . . chooses to be bound by the jury's findings." Slip op. at 6. Specifically, the district court held, based on Special Verdicts Nos. 5-7, *id.* at 11, that Nor-West was not willing or able to build a competitive cable system. The district court went on to hold that because Nor-West was unwilling and unable to compete, it lacked standing to challenge Continentals's cable monopoly. The district court further held that Nor-West was not entitled to damages for its expenditures in pursuit of the cable monopoly, because "unsuccessful bidders are not entitled to recover damages." *Id.* at 9. The district court also dismissed Continental as a defendant, on the basis that "[n]o injunctive or monetary relief was sought from Continental." *Id.* at 1 n.1.

Nor-West then moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. The district court denied Nor-West's motion. *See Nor-West Cable Communications Partnership v. City of St. Paul*, No. 3-83-Civ. 1228 (D. Minn. Feb. 27, 1989) (order) (*Nor-West II*). This appeal followed.

II. Issues

On appeal, Nor-West contends that: (1) the district court erred in holding that Nor-West lacked standing to sue, (2) even if Nor-West lacked standing to challenge the City's refusal to grant a competitive franchise, it had standing to request damages for the $265,000.00 it spent in pursuit of a cable monopoly, (3) the district court's pretrial discovery order erroneously limited Nor-West's right

to present expert witnesses, (4) the district court submitted numerous erroneous instructions and special verdicts to the jury, (5) the district court erroneously excluded certain evidence, and (6) that if damages should have been awarded against the City, Continental should also be liable for damages. Each of these arguments will be addressed in turn.

A. Standing

The jury answered Special Verdicts Nos. 1-3 and Nos. 5-7 as follows:

1. Did Nor-West have the financial ability necessary to design, construct and operate the cable television system which Nor-West requested permission to build after August 2, 1983, in competition with Continental Cablevision in St. Paul?

NO

2. Was Nor-West capable of obtaining and providing the technical capability necessary to design, construct and operate the cable television system which Nor-West requested permission to build after August 2, 1983, in competition with Continental Cablevision in St. Paul?

NO

3. If Nor-West had been given the opportunity to build the cable television system it requested permission to build after August 2, 1983, in competition with Continental Cablevision, would Nor-West have built the system?

NO

5. At this time, does Nor-West have the financial ability necessary to design, construct and operate the cable television system it has requested permission to build in competition with Continental Cablevision in St. Paul?

NO

6. At this time, is Nor-West capable of obtaining and providing the technical capability necessary to design, construct and operate the cable television system it has requested permission to build in competition with Continental Cablevision in St. Paul?

NO

7. If Nor-West were given the opportunity at this time to build the cable television system it has requested permission to build in competition with Continental Cablevision in St. Paul, would Nor-West build such a system?

NO

Nor-West I, slip op. at 1-2. After trial, Nor-West asserted that the jury's answers were merely advisory. The district court rejected this view, holding that "the court is bound by the jury's findings. Further, the court chooses to be bound by the jury's findings." *Id.* at 6. Based on the jury's findings that Nor-West was not "ready, willing and able to operate a [competitive] cable television system," *id.* at 8, the district court held that Nor-West did not have standing to sue. In denying Nor-West's motion for judgment n.o.v. or a new trial, the district court reiterated its view that Nor-West lacked standing. *See Nor-West II*, slip op. at 4-9.

On appeal, Nor-West argues that (1) the district court failed to independently review the jury's findings, (2) we must review the district court's findings *de novo*, (3) the district court erred in finding that Nor-West was neither able nor willing to build or operate a competitive cable system, (4) Nor-West has standing because it was denied the opportunity to compete, even if it were neither able nor willing to do so, (5) post-trial determinations of standing are impermissible, and (6) even if Nor-West has suffered no injury itself, it has standing to sue on behalf of St. Paul cable television consumers, who were allegedly injured by the absence of competition in St. Paul. Each of these issues will be addressed below.

1. District Court Review of Jury Findings

Where a case has been submitted to the jury on special verdicts pursuant to Fed. R. Civ. P. 49(a), the jury's findings are usually binding on the district court unless they are against the weight of the evidence. *See, e.g., Ryan v. McDonough Power Equipment, Inc.*, 734 F.2d 385, 388 (8th Cir. 1984) (affirming district court rejection of jury's special verdict as "agaisnt the great weight of the evidence"). Nor-West contends, however, that in cases involving the first amendment, the district court must review the jury's findings *de novo* and failed to do so in the present case.

In support of the first proposition, Nor-West relies on the case of *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) (*Bose*). In *Bose*, the defendant allegedly made false statements about loudspeakers manufactured by the plaintiff, and the plaintiff filed suit for

product disparagement. The district court entered judgment for the plaintiff after a bench trial, holding that the plaintiff had proven, *inter alia*, that the defendant had published its statements with "actual malice."[2] The First Circuit reversed, holding that its review of the district court's "actual malice" determination was not limited to the "clearly erroneous" standard traditionally governing factual determinations in bench trials. The Supreme Court agreed, holding that:

> the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice. . . . Appellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.

Id. at 514. Thus, *Bose* stands for the proposition that appellate courts must review a district court's finding of "acutal malice" *de novo*. This rule also applies to other "cases involving restriction on the freedom of speech protected by the First Amendment, particularly in those cases in which it is contended that the communication in issue is within one of the few classes of 'unprotected' speech," *id.* at 503, even if relevant issues were resolved by a jury rather than a judge. *Id.* at 508-09 n.27.

Nor-West argues that *Bose* required the district court "to independently review the evidence on dispositive

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[2] "Acutal malice" has been defined as "knowledge that-[a statement] was false or . . . reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

constitutional facts." Brief for Appellant at 33. Although *Bose* requires special scrutiny of jury verdicts, 466 U.S. at 510 n.29, it does not suggest that the district court rather than the court of appeals should review such verdicts *de novo*. Thus, Nor-West's argument is incorrect, and we find that the district court was not required to review the jury's special verdict answers *de novo*.[3]

2. Standard of Review on Appeal

As a rule, factual determinations relating to standing must be upheld on appeal unless they are clearly erroneous. *See Pulido v. Bennett*, 848 F.2d 880, 888 (8th Cir.), *rev'd on other grounds on rehearing*, 860 F.2d 296 (8th Cir. 1988); *see also Hope, Inc. v. County of DuPage*, 738 F.2d 797, 803 (7th Cir. 1984) (applying "clearly erroneous" rule to standing determination in case involving fourteenth amendment claim). On the other hand, it could be argued that *Bose* requires *de novo* review where, as here, the plaintiff's substantive claim arises under the first amendment.

Indeed, *Bose* clearly holds that certain first amendment issues in addition to "acutal malice" must be

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[3] Even if *Bose* did require *de novo* review of the jury's findings, it may be that the district court engaged in such review. The district court stated that even if it was not "bound by the jury's findings . . . the court *chooses* to be bound the by the jury's findings." *Nor-West I*, slip op. at 6 (emphasis added). The district court later held that even if *Bose* required it to "independently review the record, the court . . . did so by specifically choosing to adopt the findings of the jury as the facts in this action." *Nor-West II*, slip op. at 5.

reviewed *de novo* on appeal. *See Bose*, 466 U.S. at 504-08 (requiring independent review as to whether speech falls in "unprotected category" such as fighting words, incitement of lawless action, obscenity, and child pornography). *See also, Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2695 (1989) (applying *Bose* to libel action) (*Harte-Hanks*); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (requiring independent review as to whether an alleged breach of the peace protected by first amendment); *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893, 897 (D.C. Cir. 1984) (requiring independent review as to whether speech deceptive and therefore unprotected).

However, *Bose* and similar cases involve substantive determinations as to whether the plaintiff's speech is protected by the first amendment. By contrast, the district court's factual determinations in this case involve the procedural issue of standing. Accordingly, we hold that *Bose* is distinguishable and find that even in a first amendment case, factual determinations related to standing should be reviewed under the "clearly erroneous" standard.

3. Were the District Court's Findings Clearly Erroneous?

Nor-West next argues that the district court's findings were clearly erroneous as to whether Nor-West is or was financially able to build a competitive cable system, intends to build a competitive system, and is or was technically able to do so.

a. Financial Ability

Nor-West argues that it is (and was in 1983) capable of financing a competitive cable system and that the district court's holding to the contrary was clearly erroneous. Nor-West notes that its partners had a combined net worth of $76 million, including $10 million in cash. Although some of Nor-West's partners have dropped out, Nor-West's net worth is still $31 million, and one of Nor-West's partners "testified he could obtain a loan commitment if Nor-West were given a [competitive] franchise." Brief of Appellant at 19. Nor-West also notes that banks in other cities have been willing to finance cable systems and that it could build a system even more cheaply if the City allowed it to build a smaller system than that mandated by the City's RFP.

On the other hand, the City notes that Nor-West's original financing commitment lapsed in 1983 and that Nor-West has not yet obtained a financing commitment for a competitive cable system. The City's expert testified that Nor-West would not have obtained a loan commitment even if "Nor-West had a connection with a major cable company or if the partnership had substantial personal assets," Brief of Appellee City of St. Paul at 12 n.21 ("City Brief"). The City also relies on the testimony of Henry Harris, whose cable company (Metrovision) had originally contracted to operate a cable system for Nor-West. Harris testified that he would not be interested in operating a competitive cable system in St. Paul because such a project would be as "doomed to failure no matter how good a management you threw at me" and likened operation of a competitive system to being "lead pilot in

a Kamikaze plane." *Id.* at 13. Finally, numerous experts testified that "there was insufficient demand for cable television in St. Paul to sustain more than one operator," *id.* at 13, and that Nor-West would have lost money. *Id.* at 14. In response, Nor-West's experts testified that it could compete with Continental head-to-head.

Based upon our review of the evidence, we find that even if Nor-West had been able to obtain a bank loan to finance a competitive cable system, reasonable people could disagree as to whether it would have been able to operate a competitive system profitably. Accordingly, we hold that the district court's finding that Nor-West was never financially able to compete with Continental was not clearly erroneous.

b. Intent

Nor-West also contests the jurys' findings that it never intended to build a second cable system in St. Paul. Nor-West contends that its expenditure of over $1 5 million in this litigation proves that it intended to build a competitive cable system, Brief of Appellant at 35 n.106. On the other hand, the City notes that the Nor-West partners did not investigate the possibility of building a competitive system until the present litigation began, and that the partners were "unable to articulate what Nor-West was ready, willing and able to build." Brief for Appellee City of St. Paul at 11.

Reasonable people could disagree as to the credibility of Nor-West's partners' testimony that they intended to build a competitive cable system. Accordingly, we hold

that the district court's finding that Nor-West "never intended to design, construct, and operate a cable television system in St. Paul," *Nor-West I*, slip op. at 7, was not clearly erroneous. *See Harte-Hanks*, 109 S. Ct. at 2696 (even in first amendment cases, credibility determinations are reviewable under the clearly erroneous standard). We therefore need not address the question of whether Nor-West had the technical capacity to build a competitive cable system in St. Paul.

4. Do Financial Capability and Intent Matter?

Nor-West next argues that even if it lacked either the financial capability or the intent to compete with Continental, it has standing to sue, because "[i]t has been denied the *opportunity* to speak and publish. That denial alone is a judicially recognized injury." Brief for Appellant at 30 (emphasis in original). In support of this view, Nor-West relies primarily on the cases of *City of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (*Arlington Heights*) and *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (*Bakke*).[4]

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[4] Nor-West cites numerous other decisions in support of the proposition that the likelihood of actual economic injury may not be considered in ascertaining whether it has standing to sue. *See* Brief for Appellant at 32 & n.99. Some of the cases cited by Nor-West, however, simply do not involve the standing doctrine. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (denial of parade permit unconstitutional where officials not guided by any standards); *Louisiana v. United States*, 380 U.S. 145, 152-53 (1965) (literacy test unconstitutional if arbitrarily administered); *Cox v. Louisiana*, 379

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In *Bakke*, the plaintiff, an unsuccessful white applicant to a medical school, challenged a "special admissions" program setting aside 16 of 100 places for nonwhite applicants. 438 U.S. at 275. Several *amici* alleged that the plaintiff lacked standing, "arguing that he never showed that his injury-exclusion from the Medical School – will be redressed by a favorable decision." *Id.* at 280-81 n.14. The Supreme Court disagreed, holding that:

> even if Bakke had been unable to prove that he would have been admitted in the absence of a special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is *likely to be redressed* by favorable decision of his claim. The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in his class, simply because of his race.

Id. (citations omitted) (emphasis added). Thus, it could be argued that *Bakke* is on point because it defines a "likelihood that plaintiff be redressed" as a likelihood that the plaintiff be allowed to compete, rather than a likelihood that the plaintiff be able to succeed.

The opportunity to compete and the opportunity to prevail, however, are not wholly unrelated. For instance, in *Doherty v. Rutgers School of Law-Newark*, 651 F.2d 893,

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U.S. 559 (1965) (conviction for breach of peace violated due process when the defendant followed official instructions); *Staub v. Baxley*, 355 U.S. 313, 332 (1958) (officials may not be allowed standardless discretion to grant or deny permits); *Kunz v. New York*, 340 U.S. 290, 293-94 (1951) (same).

902 (3d Cir. 1981), as in *Bakke*, a white applicant challenged a graduate school's admissions program. The school argued that the applicant lacked standing to sue, because he "did not possess the qualifications to have been admitted in the absence of the minority student program he challenges." *Id.* at 895. In response, the applicant relied on *Bakke*. The district court granted the school's motion to dismiss and the Third Circuit affirmed, and interpreted *Bakke* as holding that even though an unsuccessful applicant need not show that he or she "would have been *admitted* in the absence of the challenged discriminatory program," he or she still must show that "there was a chance of successful admission had s/he not been prohibited from competing for all the seats." *Id.* at 902 (emphasis in original). The court went on to hold that *Bakke* was distinguishable, because the plaintiff "did not meet the criteria needed for acceptance for any of the seats at Rutgers Law School" and a favorable holding would not "substantially increase [the plaintiff's] chances for admission." *Id.*

In sum, *Doherty* stands for the proposition that even under *Bakke*, a plaintiff does not have standing unless he or she would have had a "realistic chance," *id.* of some benefit in the absence of the defendant's constitutional violations. In this case, Nor-West apparently did not have a chance of successfully competing with Continental. Thus, *Bakke*, is distinguishable, and *Doherty* is on point.

For the same reason, *Arlington Heights* and other cases cited by Nor-West are distinguishable. In *Arlington Heights*, a non-profit housing developer contracted to purchase a tract of land in order build racially integrated low-income housing. The developer's contract, however,

was contingent upon securing rezoning from the municipality in which the land was located. After the municipality denied rezoning, the developer filed a suit alleging unconstitutional racial discrimination. The municipality argued that the developer lacked standing to sue, because even if the municipality rezoned the property at issue, the developer "would still have to secure financing, qualify for federal subsidies, and carry through with construction." *Arlington Heights*, 429 U.S. at 261. The Supreme Court disagreed, because the developer had "shown an injury to itself that is '*likely* to be redressed by a favorable decision.' " *Id.* at 262, *quoting Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976) (emphasis added). *See also Bryant v. Yellen*, 447 U.S. 352, 368 (1980) (standing exists where it was "likely," even if uncertain, that intervenors would benefit from favorable verdict); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 74-77 (1978) (affirming district court's finding of standing where the defendant's conduct caused "substantial likelihood" of injury to the plaintiffs); *cf.* L. Tribe, American Constitutional Law, § 3-18, at 132 (2d ed. 1988) (citing *Arlington Heights* in support of proposition that standing exists if the plaintiff's "transaction or project is demonstrably prevented by *nothing but* a challenged restriction") (emphasis added).

Because Nor-West was not willing or financially able to compete with Continental, we find that Nor-West was not likely to benefit from the grant of a second franchise in this case, and therefore lacked standing. Thus, *Arlington Heights*, like *Bakke*, is distinguishable.

Accordingly, we reject Nor-West's claim that it has standing because it was denied the opportunity to compete against Continental.

5. Can Standing Be Determined After a Jury Verdict?

Nor-West next argues that "[t]o deny standing after a full adversarial trial, moreover, defeats the basic policies underlying standing." Appellant's Opening Brief at 31. In support of this proposition, Nor-West cites *Thurston v. Dekle*, 531 F.2d 1264, 1270-71 (5th Cir. 1976) (*Thurston*), *vacated on other grounds*, 438 U.S. 901 (1978), and 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, Jurisdiction 2d § 3531.15 at 105 (2d ed. 1984) ("Wright & Miller").

The Wright & Miller treatise does not support Nor-West's argument. These commentators state that:

> [i]f the case survives to trial, the burden of establishing standing remains with the plaintiff. It *may* be possible to arrange the trial to present standing issues first, so that undue waste is avoided if the case must dismissed. . . . After a trial, the court of appeals reviews the matter [of standing] on the entire record, extending appropriate deference to the findings of the trial court.

Wright & Miller § 3531.15, at 104-05 (emphasis added). Thus, the Wright & Miller treatise clearly suggests that the issue of standing may be resolved at trial, and Nor-West's representation to the contrary is incorrect.

In *Thurston*, a class of city employees alleged that the city's procedures for dismissal were constitutionally inadequate. After the district court entered judgment for the plaintiff, a Fifth Circuit decision deprived the class representative of standing. The Fifth Circuit nevertheless decided to reach the merits, holding that:

> [u]nder the unique facts of this case, we hold that where the purpose of the standing requirement has been fulfilled by the presence of an adversary context which has remained concrete throughout the entire process and where standing was subsequently determined not to exist because of a change in law affecting subject matter jurisdiction, this court should reach the merits.

Thurston, 531 F.2d at 1271. Because Nor-West's standing has not been affected by decisions issued while the present case was on appeal, *Thurston* is obviously not on point.

Accordingly, we hold that the district court's decision to decide the question of standing at trial was not reversible error.

6. Third-Party Standing

Finally, Nor-West argues that even if it lacked standing in its own right, it should be allowed to vindicate the rights of St. Paul cable television consumers to the benefits of competition, or of the threat of competition.

If, as the district court found, Nor-West was not able or willing to compete with Continental, St. Paul cable television consumers obviously would not have experienced either the reality or the possibility of competition. It follows that if Nor-West does not have standing to sue on its own behalf, it also does not have standing to sue on consumers' behalf.[5]

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[5] We accordingly decline to address the City's arguments that (1) the issue of third-party standing was not raised

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Accordingly, we hold that the district court's endorsement of the jury's special verdict answers, and its holding the Nor-West lacked standing to sue, was correct.

B. Damages for Pursuit of a Monopoly

Special Verdict No. 10 asked the jury "[w]hat sum of money did Nor-West expend in attempting to obtain a cable franchise from the City of St. Paul in 1982-83?" *Nor-West I*, slip op. at 3. The jury answered that Nor-West had spent $265,000.00. Nor-West accordingly claims that it was entitled to this amount as damages. The district court rejected Nor-West's claim, because it "would only award this amount if, in fact, the Request for Proposal ordinance was found to be unconstitutional. As a general rule, unsuccessful bidders are not entitled to recover damages . . . [thus] plaintiffs lack standing," *Nor-West I*, slip op. at 9.

The City argues that Nor-West's expenditures in 1982-83 relate not to Nor-West's attempts to obtain a second cable franchise to compete with Continental, but to its earlier attempts to obtain a cable monopoly from the City of St. Paul. However, Nor-West explicitly rejects the City's contention that Nor-West "sought the invalidation of Continental's franchise and the issuance of *the* franchise to itself," Reply Brief for Appellant at 2 (emphasis added), *quoting* Brief for Appellee City of St. Paul at 8. Indeed, Nor-West claims that its complaint and

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previously, and (2) even those who seek to assert the rights of third parties must have standing to sue on their own.

later actions "do not support the conclusion that Nor-West was actually seeking an exclusive franchise." Reply Brief for Appellant at 3, and argues that such cable monopolies are unconstitutional. If Nor-West does not request damages for the denial of a cable monopoly, Nor-West cannot now obtain damages on that basis.

Accordingly, we find that Nor-West cannot recover money spent before it decided to compete with Continental instead of supplanting it as a cable monopolist.[6]

C. Discovery Order

Under Fed. R. Civ. P. 16, district judges and magistrate judges may hold pretrial conferences and issue pretrial orders in order to expedite pending litigation. Pretrial orders may address, *inter alia*, "the identification of witnesses and documents." Fed. R. Civ. P. 16(c)(5).

In January 1987, the magistrate judge[7] issued a pretrial order which, *inter alia*, required Nor-West to disclose the identity of its expert witnesses and the nature of their testimony a month before defendants' experts did so, and required Nor-West's experts to "have finally formulated opinions" a month before defendants' experts were required to do so. The district court summarily affirmed the magistrate's order.

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[6] We therefore decline to address the City's argument that Nor-West is barred from recovering damages under state law.

[7] Janice M. Symchych, United States Magistrate Judge for the District of Minnesota.

On appeal, Nor-West argues that the district court abused its discretion by requiring Nor-West to explain its experts' testimony first. Nor-West reasons that it should not have had to guess what sort of cable system if would have to be able to build in order to have standing, and that the City had the burden of proving its defenses. These considerations, if dispositive, would presumably bar even an order requiring a simultaneous exchange of witnesses' names, because the question of what type of system Nor-West allegedly intended to build was not addressed until trial. *See Nor-West II*, slip op. at 5 ("the kind of system which the plaintiff sought to build was for the jury itself to decide").

Ordinarily, pretrial orders require the parties to list their witnesses simultaneously. *See, e.g., Patterson v. F.W. Woolworth Co.*, 786 F.2d 874, 879 (8th Cir. 1986) (district court "required all parties to file statements concerning the anticipated testimony of expert witnesses by [same date]"); *Schooley v. Kennedy*, 712 F.2d 372, 373 (8th Cir. 1983) ("the district court filed a pretrial order which included the requirements that ten days prior to trial the parties submit a proposed list of witnesses").

Because a "simultaneous witnesses" pretrial order would not have given Nor-West any more notice of defendants' theories than the order actually issued, we hold that Nor-West was not prejudiced by the district court's decision to require Nor-West to list its witnesses first. Even if the pretrial order had been prejudicial, it was not reversible error. The question of what sort of system the City could have required Nor-West to build is not dispositive if, as the jury found, Nor-West did not intend to build a competitive cable television system and

was unable to operate "the cable television system it has requested permission to build," *Nor-West I*, slip op. at 2.

D. Special Verdicts and Jury Instructions

Nor-West next challenges the district court's special verdicts and jury instructions, on the grounds that (1) the district court erroneously failed to instruct the jury what Nor-West had to do to be financially capable of competing with Continental, (2) Special Verdicts Nos. 11-15 were erroneous and prejudicial, (3) the district court erred by asking the jury about the validity of the City's reasons for denial of a second franchise without asking about the validity of the City's motives, (4) Nor-West's financial strength is irrelevant to the merits of its claim, (5) the district court erroneously submitted the substantive issue of first amendment protection to the jury, and (6) the issue of general damages should have been submitted to the jury.

Nor-West's first argument is that:

> [s]tanding, for purposes of damages, required Nor-West to convince the jury that it had the ability and intent to build a competitive cable system. That turned, in large part, on the system it could be required to build. The court, however, refused to make any rulings as to which, if any, of City's demands could be imposed on Nor-West, which was highly prejudicial.

Brief for Appellant at 42. The district court rejected this argument, because "there were irreconcilable differences of opinion between counsel for [Nor-West and the City] as to what are permissible requirements." *Nor-West II*, slip op. at 5. Furthermore, the district court's standing

instructions were "structured so that the jury first had to determine what kind of system [Nor-West] sought to build (not what was legally permissible to build), whether it had the financial [ability to operate a cable system] . . . and whether it had the necessary intent." *Id.* at 6.

As the district court noted, Special Verdicts Nos. 1-3 and Nos. 5-7 asked the jury what system "Nor-West *requested permission* to build . . . in competition with Continental," *Nor-West I*, slip op. at 1-2 (emphasis added). Thus, the question of what system the City would have required Nor-West to build is beside the point, and Nor-West lacks standing even if the district court should have instructed the jury to determine what system the City should have required Nor-West to build.

The other arguments raised by Nor-West all relate to issues other than standing. For instance, the validity of Special Verdicts Nos. 11-15 (which address the possible disruption resulting from the installation of a second cable system) is irrelevant to the issue of standing, because the district court's standing decision was based on the jury's answers to Special Verdicts Nos. 1-3 and 5-7. Similarly, the validity of the City's substantive defenses or of any instructions related to the merits of Nor-West's claim, as well as Nor-West's eligibility for recovery of general damages, relate to the merits of Nor-West's first amendment claim and not to the issue of standing.

Accordingly, we hold that the district court did not abuse its discretion in giving the special verdicts and instructions to the jury.

E. Evidentiary Issues

Nor-West also challenges two of the district court's evidentiary rulings: the exclusion of one of Nor-West's expert witnesses and the exclusion of an indemnity agreement between the City and Continental. Each of these issues will be addressed in turn.

1. Excluded Expert Testimony

At trial, Nor-West sought to introduce the testimony of William Lee, Nor-West's journalism expert. The district court excluded such testimony, because Dr. Lee's testimony was "without foundation and irrelevant to the issues submitted to the jury." *Nor-West II*, slip op. at 14. On appeal, Nor-West challenges the district court's exclusion of Lee's testimony, on the grounds that Lee would testify as to "the effect of [the] City's control of the cable television market on cable operators as journalists, including the danger of content discrimination," Brief for Appellant at 42, and "the need for franchise provisions and the genuineness of [the] City's alleged defenses and interests . . . such as universal service and [the need for] access channels," Reply Brief for Appellant at 19-20. We fail to see how such testimony relates to standing, and accordingly find it unnecessary to decide whether Lee's testimony was properly excluded.

2. The Indemnity Agreements

Nor-West also unsuccessfully sought to introduce evidence of two indemnity agreements between Continental and the City. These agreements provided that

Continental would indemnify the City from liability arising out of the City's franchising procedure and its failure to award more than one cable franchise. The district court excluded such evidence under Federal Rules of Evidence 403 and 411. On appeal, Nor-West attacks the district court's ruling on the merits, and argues that the indemnity agreements are relevant to standing, for two reasons.

First, Nor-West argues that because the agreements were negotiated before December 5, 1983 (the date on which Nor-West first requested a second franchise), their existence is probative as to whether Nor-West in fact intended to seek a second franchise and the credibility of City officials' testimony that "they had no idea, until the receipt of the December 5 letter, that Nor-West was claiming to seek a second franchise." Reply Brief for Appellant at 18. However, at least one other company besides Nor-West and Continental competed for an exclusive franchise. Thus, defendants' execution of the indemnity agreements does not prove that defendants believed that Nor-West planned to seek a competitive franchise, let alone that Nor-West actually intended to do so.

Second, Nor-West argues that the indemnity agreements prove that the City's expert witnesses were biased, because they were "in fact, testifying for Continental and not for [the] City, as the jury was led to believe." Reply Brief for Appellant at 18. As the City was the major defendant in this action, it is obvious that the City's expert witnesses would have been equally biased no matter which defendant was paying them.

We therefore hold that the district court's evidentiary rulings were unrelated to the issue of standing, and

accordingly decline to address those rulings on the merits.

F. The Dismissal of Continental

Finally, Nor-West challenges the district court's dismissal of Continental as a defendant. If, as we believe, Nor-West lacks standing to sue the City, it also lacks standing to sue Continental.

Accordingly, we hold that Nor-West lacks standing to bring the present suit and affirm the district court's judgment in favor of defendants.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX 2

DISTRICT COURT'S ORDER FOR JUDGMENT (SEPT 1, 1988)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

NOR-WEST CABLE COMMUNICATIONS, PARTNERSHIP, a general partnership,

Plaintiff,

v.

CITY OF SAINT PAUL, a City of the First Class,

Defendant,

and

CONTINENTAL CABLEVISION OF ST. PAUL, INC.,

Defendant in Intervention.

3-83 CIV 1228

ORDER FOR JUDGMENT

The above entitled matter came on for trial before the undersigned and a jury on April 18, 1988.[1] On June 10, 1988, the jury rendered its special verdict as follows:

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[1] No injunctive or monetary relief was sought from Continental Cablevision of St. Paul, Inc. Continental's participation in the case was limited to the indemnification provisions of its contract with the City, evidence of which the court declined to admit. At pretrial conference, Continental indicated that it

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1. Did Nor-West have the financial ability necessary to design, construct and operate the cable television system which Nor-West requested permission to build after August 2, 1983, in competition with Continental Cablevision in St. Paul?

NO

2. Was Nor-West capable of obtaining and providing the technical capability necessary to design, construct and operate the cable television system which Nor-West requested permission to build after August 2, 1983, in competition with Continental Cablevision in St. Paul?

NO

3. If Nor-West had been given the opportunity to build the cable television system it requested permission to build after August 2, 1983, in competition with Continental Cablevision, would Nor-West have built the system?

NO

4. Did the City, by use of its request for proposal process, intend to discourage expression of the viewpoint of Nor-West?

NO

5. At this time, does Nor-West have the financial ability necessary to design, construct and operate the cable television system it has requested permission to build

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would not actively participate at trial and that no one would, in fact, sit at counsel table. The plaintiff stated it had no objection to Continental's decision not to participate in the trial. The court will dismiss Continental Cablevision of St. Paul, Inc.

in competition with Continental Cablevision in St. Paul?

NO

6. At this time, is Nor-West capable of obtaining and providing the technical capability necessary to design, construct and operate the cable television system it has requested permission to build in competition with Continental Cablevision in St. Paul?

NO

7. If Nor-West were given the opportunity at this time to build the cable television system it has requested permission to build in competition with Continental Cablevision in St. Paul, would Nor-West build such a system?

NO

8. If, in 1983, Nor-West had been permitted to and had constructed the cable television system which Nor-West requested permission to build in competition with Continental Cablevision in St. Paul, what would be the difference, if any, between the cost of such a system and its current value?

$ 0

9. If, at this time, Nor-West were to be permitted to construct the cable television system which it requested permission to build in St. Paul in competition with Continental Cablevision what damages, if any, would the plaintiff suffer due to the delay of its entry into the market?

$ 0

10. What sum of money did Nor-West expend in attempting to obtain a cable franchise from the City of St. Paul in 1982-83?

$265,000

11. As they existed in 1983, would the public utility facilities and rights of way in St. Paul have been unable, by reasonable rearrangement, to accommodate more than one cable television system?

NO

12. Would the installation and maintenance of more than one cable television system in St. Paul cause a substantial disruption of or substantial burden to the public domain?

YES

13. Would the installation and maintenance of more than one cable television system in St. Paul create substantial environmental problems?

YES

14. Would the installation and maintenance of more than one cable television system in St. Paul substantially disrupt the use of private property?

NO

15. Would the installation and maintenance of more than one cable television system in St. Paul cause substantial safety hazards to the public?

NO

16. Does St. Paul have a substantial interest in ensuring the availability of cable television service to all St. Paul residents?

YES

17. Does St. Paul have a substantial interest in ensuring the availability of some cable television channels for public, educational and governmental access uses?

YES

18. Is the economic demand for cable television in St. Paul sufficient to support the existence of only one cable television company?

YES

The court adopts the facts found by the jury as set forth above to be the facts in this action.

I. JURY FINDINGS.

In cases in which both legal and equitable claims are made and in which a jury trial is demanded for the legal claims, the general rule is that the legal issues are to be tried first with the court deciding the equitable claims later. *Curtis v. Loether*, 415 U.S. 189, 197 n.11 (1974). When there are facts common to both claims, those facts are first submitted to a jury, if one is demanded. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). On the court's own motion or by agreement of the parties, a jury can be merely advisory; the court must then make its own findings of fact conclusions of law. Fed. R. Civ. P. 39(c).

The plaintiff, Nor-West, demanded a jury. Throughout the pretrial conferences and the trial itself, the court repeatedly suggested that the plaintiff reconsider and have the case tried to the court alone. Prior to and throughout trial, the plaintiff insisted on the use of the jury. It was, therefore, agreed that the special verdict form be submitted to and answered by the jury. It was the intention of both the court and the parties that the fact issues were to be determined by the jury. At no time did the court or did the parties agree that the jury be merely advisory.

The plaintiff now asserts that jury findings numbered 5, 6, and 7 are merely advisory, even though counsel for plaintiff argued at an earlier date that when legal and equitable claims are tried together, all factual determinations made by the jury are binding on the trial court.[2] Further, in order for jury findings to be advisory, the parties or the court must have agreed in advance that the findings were merely advisory. *See, e.g., Stockton v. Altman*, 432 F.2d 946, 950 (5th Cir. 1970), *cert. denied*, 401 U.S. 994 (1974). *See also, Blackhawk Hotels Co. v. Bonfoey*, 227 F.2d 232 (8th Cir. 1955).

This court recognizes that when a claim is reserved for the court to decide, the court is *entitled* to make necessary findings independent of the jury. *Jungmann v. St. Regis Paper Co.*, 682 F.2d 195, 197 (8th Cir. 1982). However, in a case such as this, the jury was asked factual questions which go to the heart of the issue of Article III standing. It would be impossible for the court to hold that the plaintiff lacks standing for the legal issue, which must be tried first, but that the plaintiff has standing for the equitable issue. Because the plaintiff insisted earlier that the jury verdict on the legal issue was binding on the trial court's determination of the equitable claims, the court is bound by the jury's findings. Further, the court chooses to be bound by the jury's findings. Finally, the court adopts such findings as the facts in this case.

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[2] *See Plaintiff's Pretrial Submission*, September 12, 1986. It is simply too late for the plaintiff to argue that some of the jury findings should now be taken as advisory.

III. [sic] STANDING

To have Article III standing a plaintiff must have a personal stake in the outcome of the controversy. Further, the plaintiff must itself be injured, and such injury must be fairly traceable to the conduct of the defendant. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977). Likewise, the injury suffered by the plaintiff must be capable of being redressed by a favorable decision of the court. *Id.* Standing concerns "whether the particular plaintiff is entitled to an adjudication of the particular claim asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984). Without Article III standing, a plaintiff cannot request any type of judicial relief. *Safir v. Dole*, 718 F.2d 475, 481 (D.C. 1983), *cert. denied*, 467 U.S. 1206 (1984).

The jury found that Nor-West did not have the financial ability, technical capability, or the intent necessary to design, construct, or operate a cable television system after August 2, 1983. Likewise, the jury found that at the time of trial the plaintiff, Nor-West, does not have the financial ability, technical capability or the intent necessary to design, construct and operate a cable television system. Therefore, the plaintiff lacks the necessary Article III standing to assert that its first amendment rights were violated. The plaintiff suffered no injury flowing from the defendant's conduct, because it in fact never intended to design, construct and operate a cable television system in St. Paul, nor did it have the ability to so design, construct and operate a cable television system.

It should be noted that it was not necessary for the plaintiff to prove that a cable system *would* be built, but the plaintiff must establish that it *could* have built a cable

system. The United States Supreme Court has recognized that the standing issue does not require that a plaintiff secure exact financing. The court recognizes that all construction projects are subject to some uncertainties. *Arlington Heights*, 429 U.S. at 261. However, in order to prevail, the plaintiff here must have shown that it had the financial commitments or ability to design, construct and operate the cable company it requested after August 2, 1983, and that it had such commitments or ability at the time of trial. Based upon the evidence at trial, the jury found no financial ability either after August 2, 1983, or at the time of trial.[3]

The Supreme Court in *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *aff'd.*, 476 U.S. 488, 494 (1986), stated that "the activities in which [the plaintiff] allegedly seeks to engage plainly implicate First Amendment interests." The plaintiff in its complaint, as well as the court in its instructions, recognized that to be a cable operator an entity must be ready, willing and able to operate a cable television system. This in turn was defined by plaintiff and accepted by the court as having the financial and technical capabilities plus the intent necessary to design, construct and operate a cable television system. The jury found the plaintiff not to be ready, willing and able to operate a cable television system in St. Paul and, therefore, it was not and is not a

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[3] The plaintiff submitted a letter to this court dated August 3, 1988, indicating that it has, since the conclusion of the trial, arranged some type of financing. Any such evidence should have been available and offered at trial. Its submission at this time is totally inappropriate.

cable operator entitled to First Amendment protection. Simply stated, the plaintiff lacks a legally protectable interest.

III. DAMAGES.

Alternatively, even if the plaintiff did have standing, the jury found that the plaintiff suffered no damages. The jury was asked two separate damage questions apart from the question of what sum of money the plaintiff expended in seeking the original franchise. On each of the two damage questions (questions 8 and 9) the jury was instructed to answer the questions separately. The jury was further instructed that it was up to the court to determine if the City was liable to the plaintiff and that the plaintiff would recover only one amount from either question 8 or 9, but not both. The court indicated that it would award the appropriate damage calculation in the amount found by the jury. The jury was instructed that regardless of how they answered the other questions on the special verdict form, they were required to answer questions involving the plaintiff's request for damages. The court continued that "whether or not the plaintiff will in fact recovery [sic] money damages will be decided by me after I receive the answers to your other special verdict questions."

With these instructions in mind, the jury found no damages. Thus, even if the plaintiff had standing and the court found the balance between the plaintiff's first amendment right and the justifications found by the jury

to rest in favor of the plaintiff,[4] the jury found by its answers to questions 8 and 9 that the plaintiff sustained no damage.

The jury did find that the plaintiff expended $265,000.00 in seeking the cable television franchise in 1982-1983. The court would only award this amount if, in fact, the Request for Proposal ordinance was found to be unconstitutional. As a general rule, unsuccessful bidders are not entitled to recover damages. *Carlson T.V. v. City of Marble*, 612 F. Supp. 669, 672 (D. Min. 1985). However, challenges to a procedure later to be determined unlawful can result in a recovery of damages and expenses. *Telephone Associates v. St. Louis County Board*, 364 N.W.2d 378 (Minn. 1985). Since the plaintiff lacks standing, it has no way to challenge the ordinance. Because the plaintiff lacks standing to challenge the constitutionality of the ordinance, the court cannot find the ordinance unconstitutional, and no expenses can be recovered by the plaintiff.

IV. EQUAL PROTECTION CLAIM.

The plaintiff also asserts an equal protection claim. The plaintiff agreed to have the court decide this claim at the same time as the claim for injunctive relief. For the same reason the plaintiff lacks standing to challenge the

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[4] The court specifically declines to analyze or speculate as to what its conclusion would be if it had to, in fact, balance the City's justifications as found by the jury against the first amendment right of the plaintiff.

ordinance and the first amendment status, it likewise lacks standing on the equal protection issue.

To have a valid claim under the equal protection clause the plaintiff must be a member of the class discriminated against. *Warth v. Seldin*, 422 U.S. 490 (1975). The jury found that the plaintiff did not have the financial or technical capabilities or the intent necessary to design, construct and operate a cable television system either after August 2, 1983, or at the present. Thus the plaintiff is not a member of the class of cable operators arguably discriminated against. The plaintiff cannot prevail on an equal protection violation claim.

V. INJUNCTIVE RELIEF.

As discussed earlier, the jury found the plaintiff was not ready, willing and able to be a cable operator at the time of trial. Further, the jury found even if given the opportunity to build, the plaintiff did not intend to build at the time of trial. In order for this court to grant the plaintiff injunctive relief, the court must find the ordinance unconstitutional. Because the plaintiff does not have standing, *see discussion supra*, the question is not properly before the court. Thus, any request for injunctive relief must be denied.

The plaintiff argues that the court must make its own findings of fact and conclusions of law as to this claim for equitable relief, contending that the jury findings 5, 6 and 7 are not "facts common" to the legal claim. However, jury findings 5, 6 and 7 deal with facts common to the legal claim, as they would have set parameters as to the type of damage the court would award. The court

declines to make separate findings of fact and conclusions of law and adopts the findings of the jury to be the facts in this case.

The question of whether the ordinance is content neutral need not be answered. Because the plaintiff is not a first amendment speaker, it lacks the necessary standing to challenge the disputed ordinance.

Upon the foregoing,

IT IS ORDERED That:

1. Continental Cablevision of St. Paul, Inc., be, and the same hereby is, dismissed as a party to this action.

2. The Clerk of Court enter judgment as follows:

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED That Continental Cablevision of St. Paul, Inc., is hereby dismissed as a party to this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That the plaintiff, Nor-West Cable Communications Partnership, have and recover nothing of the defendant, and the action is dismissed with prejudice.

DATED: September 1st, 1988.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U.S. District Judge

APPENDIX 3

DISTRICT COURT'S ORDER DENYING MOTIONS J.N.O.V. ETC (Feb. 27, 1989)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership,

Plaintiff,

v.

CITY OF SAINT PAUL, a City of the First Class,

Defendant.

3-83 CIV 1228

ORDER

The above entitled matter is before the court on plaintiff's motions for judgment notwithstanding the verdict ("JNOV") and preliminary injunction or, in the alternative, a new trial.[1] This case was tried before the undersigned and a jury commencing on April 18, 1988. After a lengthy trial, an extended charge conference and

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[1] In plaintiff's motion for new trial, plaintiff requested the court to reconsider its order dated September 18, 1987, in which the undersigned affirmed Magistrate Janice M. Symchych's order relating to sanctions of the plaintiff and limiting the scope of the plaintiff's witnesses and their testimony at trial. Plaintiff's Memorandum in Support of its Motion for New Trial at 28 n. 9. The order dated September 18, 1987, is sound and does not constitute grounds for a new trial.

jury deliberations, the jury returned its special verdict on June 10, 1988.

On September 1, 1988, the court issued its order for judgment adopting the findings of fact made by the jury. The court concluded that the plaintiff lacked the standing necessary to sue or seek injunctive relief, and that even if the plaintiff had standing and if the court would have balanced the factual issues in favor of the plaintiff, the court would be unable to award damages or grant injunctive relief because the jury found that the plaintiff suffered no damages.[2]

Before addressing the merits of the plaintiff's motions, several observations are appropriate. First, the case was ably tried and hard fought. The lack of law in the area provided continuing obstacles for the court as well as the parties. Second, the vastly different views of the parties as to the legal theory of the case created a continual struggle among the parties and the court. The plaintiff, arguing that cable television and its operators are nothing more than high-tech newspapers and editors, believes that, like newspapers, the standard of review of defendant's conduct was to be strict scrutiny under the first amendment. That would require that any municipal regulation, including that of the defendant, be based on a

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[2] In the September 1, 1988, order, the court dismissed Continental Cablevision. In its motions, the plaintiff asserts that such action was unfair and highly prejudicial to the plaintiff and that it should be able to seek damages jointly against Continental. Not only did the plaintiff not seek injunctive or monetary relief from Continental, the jury verdict finding no damages renders the plaintiff's argument moot.

"compelling governmental interest." Charge Conference on June 2, 1988 (hereinafter cited as Charge Conference I) at 16; Plaintiff's Memorandum in Support of its Motion for New Trial at 25. The defendant, on the other hand, recognizing that cable television and its operators have some first amendment protection, argued that the standard of review was that "the interest of the government has to be a reasonable interest meaning that it certainly has to rise to more than the level of an incidental interest." Charge Conference I at 3. Finally, the parties disagreed as to the extent of the jury's role as the finder of fact. The plaintiff, who demanded a jury, did not want the alleged defenses of the City to be submitted, whereas the defendant thought their submission was imperative. Such fundamental differences remain apparent in the post-trial submissions of the parties.

After a lengthy and thorough review of the record in this case, as well as the extended and verbose post-trial briefs submitted by counsel, the court concludes that the plaintiff's motions must be denied.

I. PLAINTIFF'S MOTION FOR JNOV AND PRELIMINARY INJUNCTION.

1. Standard of Review.

The plaintiff moves for JNOV based upon three alternative grounds, addressed here individually. The standard for granting JNOV is well-settled. The court must decide as a matter of law whether the evidence was sufficient to create an issue of fact for the jury. *Lane v. Chowning*, 610 F.2d 1385, 1388 (8th Cir. 1980). *See generally* 9 C. Wright & A. Miller, *Federal Practice and Procedure*,

§§ 2524 and 2536 (1971). In making this determination the court must: a) consider the evidence in the light most favorable to the prevailing party; b) assume that the jury resolved all conflicts of evidence in favor of the prevailing party; c) assume as true all facts which the prevailing party's evidence tended to prove; d) give the prevailing party the benefit of all favorable inferences which may be reasonably drawn from the proven facts; and e) deny the motion if in light of the above, reasonable jurors could differ as to the conclusions that could be drawn from the evidence. *See, e.g., McGee v. South Pemiscot Scott Dist. R-V,* 712 F.2d 339, 3443 (8th Cir. 1983) citing *Hanson v. Ford Motor Co.,* 278 F.2d 586, 596 (8th Cir. 1960). In addition, one panel of the Eighth Circuit Court of Appeals has imposed a further restriction on granting JNOV by stating that as a general proposition, only evidence favorable to the non-moving party should be considered. *Dace v. ACF Indus., Inc.,* 722 F.2d 374, 377 (8th Cir. 1983).[3]

2. Discussion.

First, the plaintiff argues that the portion of the jury's special verdict that goes to standing is not binding on the court. The plaintiff cites *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485 (1984) for the proposition that in a case in which constitutional rights are involved, those findings by the jury which are favorable to the

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[3] Although *Dace* involved a directed verdict, the standard for granting a motion for directed verdict and a motion for JNOV are the same. *See Farner v. Paccar, Inc.,* 562 F.2d 518, 522 (8th Cir. 1977). *See also Rule v. Lutheran Hospitals & Homes Society of America,* 835 F.2d 1250, 1252 (8th Cir. 1987).

exercise of the plaintiff's first amendment rights are binding on the court, but those findings which are not favorable to the plaintiff are not binding.

The defendant maintains that *Bose* is not as broad as the plaintiff implies. The court agrees that by its own terms *Bose* is limited in its application to appellate court review and is not nearly as sweeping as the plaintiff suggests. *Id.* at 514. Yet, even if under *Bose* the court was not bound by the portions of the jury verdict that were unfavorable to the plaintiff's first amendment rights and it was necessary to independently review the record, the court, in its September 1, 1988, order did so by specifically choosing to adopt the findings of the jury as the facts in this action. The plaintiff's argument is without merit.

Secondly, the plaintiff contends the jury was forced to answer the special verdict dealing with standing (Questions 1-3, 5-7) in a "constitutioal vacuum" and that without instructions as to what kind of system the plaintiff was legally required to build, the jury was unable to properly analyze and answer the questions. From the outset, according to the plaintiff, it has been willing to construct a system consistent with all "legitimate police power demands." Without instructing the jury on what was legally permissible for the City to require was putting the cart before the horse, in the eyes of the plaintiff.

The court, recognizing that the defendant believes all its requirements were lawful, notes that there were irreconcilable differences of opinion between counsel for plaintiff and defendant as to what are permissible requirements. The court instructed the jury that the kind

of system which the plaintiff sought to build after August 2, 1983, and at the time of trial (whether scaled down in size, shape or magnitude), was for the jury itself to decide. Each of the standing questions and their corollary instructions were intended to be structured so that the jury first had to determine what kind of system plaintiff sought to build (not what was legally permissible to build), whether it had the financial or technical ability to design, construct and operate that cable television system, and whether it had the necessary intent.[4] The plaintiff's objections to the jury instructions are noted but are not persuasive.

Likewise, the request of the plaintiff that the jury was unable to properly answer the special verdict without knowing how the court was to perform the balancing and the court was required to instruct the jury on precisely what the result would be depending on which alleged defenses they found to exist is without merit. The court considered the plaintiff's request in this regard, but could find no way to instruct the jury in the manner now suggested. Even the plaintiff was unable to divine a way to instruct the jury on how the court would make such a determination based on the number of potential results the jury could have reached.[5] The jury, in the instructions,

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[4] For example, the court in its instructions stated: "The cable system the plaintiff would have designed, constructed and operated is in dispute between the parties. You, as a jury, must determine what system the plaintiff had requested . . . and then determine whether the plaintiff had the necessary financial ability to design, construct and operate that cable television system." Jury Instruction at 28.

[5] During the charge conference, the court invited plaintiff's counsel to submit proposed jury instructions on this point. Charge Conference I at 69. None were submitted.

was made aware of the parameters of its role and was told that the court was to balance the interests of the City against the first amendment rights of the plaintiff.[6] The jury instructions accurately state the current law, that is, in this type of case, that the finder of fact decides the pure issues of fact and the court applies such facts and balances the first amendment rights of the plaintiff against the interests of the City. The court was not and is not persuaded by the plaintiff's complaints regarding the method of submission.

Finally, the plaintiff contends that it should recover the $265,000.00 found by the jury to be its expenses in seeking the franchise. The court, in its order of September 1, determined that such recovery would be warranted only if the ordinance was found unconstitutional. The court found that the plaintiff lacked the standing to challenge the ordinance's constitutionality and, therefore, the court could not find the ordinance unconstitutional and the plaintiff could not recover the expenses.

The plaintiff alleges that by participating in the franchising process, it had standing to challenge the procedures, hence, the court should rule on their constitutionality and award the plaintiff its $265,000.00 *and* grant a preliminary injunction.

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[6] The court did instruct the jury that, "Based upon your factual determinations . . . it will be my responsibility to then determine whether or not the first amendment rights of the plaintiff have been violated as is alleged in the complaint or if the contrary is true" and "after your answers are returned to the court, it is the duty of the court to apply the appropriate law and the facts as you find them." Jury Instructions at 20.

The plaintiff is still required to have the necessary standing to challenge the procedure. In the context of this case, being an unsuccessful bidder is simply not enough. At the very least, the plaintiff must show that it was ready, willing and able to design, construct, and operate a cable system as asked in questions 1, 2 and 3. Absent such showing, the plaintiff lacks the necessary standing. Similarly, even if the court were inclined to find the plaintiff had the requisite standing, the jury found it was not ready, willing and able *at the present time* and, therefore, it is not entitled to a preliminary injunction as requested.

The plaintiff also argues that the City's franchising system is unconstitutional as a matter of law and that there are no valid defenses justifying the City's choice to franchise. Such arguments are moot and the court sees no merit in discussing them at this juncture. The plaintiff contends, on a variety of issues, that the evidence is so overwhelming that the court must enter JNOV. The plaintiff's position has been carefully considered. The court is satisfied as to each and everyone of these objections, including the objection concerning the alleged lack of evidence dealing with the finding of no financial ability, that in light of the standard of review for JNOV, reasonable jurors could differ as to the conclusions that could be drawn from the evidence and the plaintiff's motion for JNOV must be denied[7] and plaintiff's motion for a

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[7] The plaintiff proposes to provide, if the court feels necessary, more evidence to help the court resolve the issue of constitutionality of the City's franchising process. In the meanwhile, it requests a preliminary injunction so it can commence

(Continued on following page)

preliminary injunction likewise, as a corollary, must be denied.

II. PLAINTIFF'S MOTION FOR NEW TRIAL.

1. Standard of Review.

The plaintiff contends, in general, that its motion should be granted because first, the court failed to give the proper instructions and the instructions that were given were insufficient. Secondly, the plaintiff contends several evidentiary issues decided in the defendant's favor were in error and were so prejudicial as to warrant a new trial.

The court's power to grant a new trial is broad. A new trial should be granted if "substantial justice has not been done." C. Wright & A. Miller, *Federal Practice and Procedure*, § 2803 at 32 (1973). Substantial justice has not been accomplished when the jury verdict is contrary to the "clear weight, overwhelming weight or great weight of the evidence," *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 416 (8th Cir. 1985) or when the court's improper evidentiary ruling was prejudicial to the moving party. *Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 359-60 (8th Cir. 1973).

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construction "despite the City's grant of an unconstitutional monopoly to Continental." Plaintiff's Post-Trial Brief JNOV at 34-35. The court cannot reach the question of constitutionality because the plaintiff lacks the necessary standing to so challenge. Plaintiff's request is denied.

In support of their broad assertions that the instructions were faulty and insufficient, and that substantial justice has not been done, the plaintiff offers a "laundry list" of objections.[8] The plaintiff takes a similar approach to its objections concerning the evidentiary issues.[9] After careful review of each of the objections raised by plaintiff, the court is satisfied that none of the issues raised warrant a new trial, nor were the allegedly improper evidentiary rulings, even if arguably erroneous, prejudicial to the plaintiff, Norwest, so as to require a new trial.

2. Discussion.

The court is satisfied that none of the allegations amounted to an error and even if such allegations rose to the level of error, it was harmless and could not have prejudiced the plaintiff's case and substantial justice has

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[8] Plaintiff's objections are summarized as follows: 1) The defendant admitted in its answer that the plaintiff has financial capacity and such admission is binding in the defendant; 2) constitutional standing does not depend on the plaintiff having assured financing; 3) the order of September 1 ignores overwhelming evidence to the contrary; 4) the court misunderstands the standing requirements; 5) submission of irrelevant defenses to the jury by the court was an extremely prejudicial and reversible error under Rule 49(a); 6) failure of court to submit applicable principles of law to the jury; and 7) wording of special verdicts was ambiguous and vague.

[9] Likewise, the plaintiff's objections can be summarized as follows: 1) its refusal to receive plaintiff's post-trial loan commitment is unfair; 2) exclusion of indemnity agreement was incorrect under Rule 403 to show bias; 3) dismissal of Continental was unfair and highly prejudicial to the plaintiff; and 4) failure to submit Dr. Lee's testimony to the jury was in error.

been done. As discussed previously, the evidence produced at trial was not of such a nature that the verdict was against the clear weight of the evidence. As the court indicated earlier, having adopted the finding by the jury as the facts in this case, the plaintiff clearly fails to have the necessary and requisite standing. *See Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72 (1978). Many of the allegations of the plaintiff need not be addressed as they go to the substance of the plaintiff's case. *Midwest Communications v. Minnesota Twins*, 779 F.2d 444, 453 (8th Cir. 1985). Having found the plaintiff lacks standing, any argument relating to special verdict questions 8 through 18 is immaterial.

The court does, even though it is unnecessary, wish to briefly discuss several of the allegations made by the plaintiff as they may, tangentially, affect the plaintiff's motion. The plaintiff argues that irrelevant defenses were put before the jury and as such, the effect on the jury was so overwhelming that a new trial is in order. Specifically, the plaintiff alleges that none of the defense-related verdict questions should have been given. The court continually stressed throughout the trial and charge conference its desire to have before it full and complete factual determinations. The special verdict questions dealing with space on poles, environmental impact, and economic scarcity all stem directly from *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), and cases cited therein.[10] Special Verdict Questions 11, 13, and 18

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[10] "We are unwilling to decide the legal questions posed by the parties without a more thoroughly developed record of proceedings in which

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respectively. Questions dealing with disruption of public domain, disruption of private property, safety hazards and interest of the City in universal service and access channels (Special Verdict Questions 12, 14, 15, 16 and 17 respectively), all flow directly from the Supreme Court's discussion of the needed factual determinations in *Preferred*.[11] The Supreme Court was clear that without full and complete factual determination, further consideration was impossible. Looking to *Preferred* for guidance, this court was completely justified in submitting each and

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> the parties have an opportunity to prove those disputed factual assertions upon which they rely." *Id.* at 494.

Likewise, the Supreme Court cited *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805-807 (1984). The direct cite leads one to a discussion on a municipality's weighty, essentially aesthetic interest in the prohibition of visual clutter. In examining *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), also cited by the Supreme Court in *Preferred*, leads one to a discussion of the quality of the governmental interest which must exist when " 'speech' and 'non-speech' elements are combined in the same course of conduct." *Id.* at 376. The Supreme Court obviously felt factual determinations of aesthetic and disruption were necessary, otherwise such pinpoint cites would be unnecessary. Finally, the court specifically mentions the need for a factual determination as to existence of a natural monopoly. *Id.*

[11] The Supreme Court recognized that the factual determinations not made at the trial level dealing with space on poles ("excess physical capacity"), economic demands, practical disruptive effect of controlling and maintaining a cable system or public rights of way, aesthetics, traffic delays and hazards must be addressed by the finder of fact before the legal questions can be answered.

every special verdict question as to the alleged defenses of the City to the jury.

The plaintiff objects to the jury instructions as being vague. Absent objection at trial, such objection is waived. *See, e.g., Skogen v. Dow Chemical Co.*, 375 F.2d 692, 703 (8th Cir. 1967); *Bell v. Mickelsen*, 710 F.2d 611, 616 (10th Cir. 1983). The plaintiff has so waived objections based on vagueness. Further, the plaintiff objects to the inclusion of the word "substantial" and of the failure of the court to define the word "substantial" used throughout the special verdict form. Plaintiff's counsel, during the charge conference, stressed the need to include some type of a standard in each of the defense related questions. Mr. Farrow suggested using either the word "substantial" or "compelling," although his preference was to use "compelling." Charge Conference I at 11, 16. At no time did plaintiff's counsel object to the failure to define, or even suggest that the court define the word "substantial." Failure to object to such an inclusion at trial acts as a waiver at a later time. The plaintiff has so waived its objection to the use of and the lack of definition of the word "substantial."

The plaintiff complains that the indemnity agreement which was excluded under Rule 411 and 403 as unduly prejudicial is, in fact, relevant, admissible, and necessary for a fair jury determination of the factual issues. Further, the plaintiff alleges the agreement was relevant to show bias of a variety of witnesses. During the trial the court ruled that the indemnity agreement fell squarely within Rule 411's prohibition and also was excludable under Rule 403 as its probative value was far outweighed by its prejudicial effect. Further, the court gave counsel for

plaintiff ample opportunity to show bias of each witness. The use of the indemnity agreement for this purpose was unnecessary. Evidence of any kind of indemnity was irrelevant to all of the factual issues submitted to the jury. The evidentiary ruling was not improper.

The plaintiff complains as well that Dr. Lee's testimony was crucial to the factual determination asked in Question No. 4, as to whether the City intended to discourage Nor-West's viewpoint. A portion of Dr. Lee's testimony was taken outside the hearing of the jury. The undersigned ruled that such information was properly restricted from the jury. The jury was entirely capable of drawing its own inferences and conclusions from the existing evidence. *See, e.g., Strong v. E. I. DuPont de Nemours Co., Inc.*, 667 F.2d 682, 686 (8th Cir. 1981). The court allowed the necessary evidence to decide that question. Any error which occurred is harmless. The remainder of Dr. Lee's testimony was, in the court's view, without foundation and irrelevant to the issues submitted to the jury.

The court has painstakingly examined each of the plaintiff's points of contention in its motion for a new trial. In sum, the court is satisfied that the parties received a fair trial and substantial justice has been done.

Based on the record as presently constituted, the written submissions of counsel, and the foregoing discussion,

IT IS ORDERED That:

1. Plaintiff's motion for judgment notwithstanding the verdict and preliminary injunction be, and the same hereby is, DENIED;

2. Plaintiff's motion for a new trial be, and the same hereby is, DENIED.

DATED: February 27, 1989.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U. S. District Judge

APPENDIX 4

ORDER OF DEC. 26, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership,

Plaintiff,

v.

CITY OF SAINT PAUL, a City of the First Class, and KALBA-BOWEN ASSOCIATES, INC., a corporation,

Defendants,

and

CONTINENTAL CABLEVISION OF ST. PAUL, INC., a corporation,

Defendant in Intervention.

3-83 CIV 1228

MEMORANDUM ORDER

Smith, Juster, Feikema, Malmon & Haskvitz, by RONALD L. HASKVITZ, Esq., Minneapolis Minnesota, and Farrow, Schildhause, Wilson & Rains, by E. NICHOLAS SELBY, Esq., Sacramento, California, appeared for plaintiff.

Robins, Zelle, Larson & Kaplan, by ERNEST I. REVEAL, Esq. and DEBORAH J. PALMER, Esq., St. Paul, Minnesota, and EDWARD P. STARR, City Attorney, St. Paul, Minnesota, appeared for defendant City of Saint Paul.

O'Connor & Hannan, by ROBERT A. BRUNIG, Esq., Minneapolis, Minnesota, and Hogan & Hartson, by JAY E.

RICKS, Esq. and LISA HOOK, Esq., Washington, D.C., appeared for Continental Cablevision of St. Paul, Inc.

This matter comes before the court upon the motions of defendant in intervention Continental Cablevision of St. Paul, Inc. (Continental) (Docket Entry No. 37) and defendant City of St. Paul (City) (Docket Entry No. 38) to dismiss specific counts of the complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

Plaintiff Nor-West Cable Communications Partnership (Nor-West) by its amended complaint brings this action against defendants City and Kalba-Bowen Associates, Inc. (Kalba-Bowen). Continental is a defendant in intervention. The City has moved to dismiss the first (civil rights-due process), fourth (civil rights-first amendment), fifth (Sherman Act § 2), and sixth (Sherman Act § 1) claims for relief in Nor-West's amended complaint. Continental's motion seeks to dismiss the fourth, fifth and sixth claims for relief.

I. Antitrust Claims: Counts 5 and 6

Defendants move to dismiss counts 5 and 6 on the basis that the City's actions in awarding a cable communications franchise are exempt from antitrust scrutiny under the doctrine of state action immunity. That doctrine was first articulated by the United States Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943). *Parker* held that the Sherman Act did not reach actions directed by a state legislature. In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the court in a plurality opinion

held that while municipalities were not automatically afforded the "state action" exemption by their mere status as governmental entities, their actions might reflect state policy and therefore would be protected when they acted "pursuant to state policy to displace competition. . . . *Id.* at 411, 413. The state policy relied upon would have to be "clearly articulated and affirmatively expressed" to receive exemption. *Id.* at 410. A political subdivision need not, however, be able to point to a detailed legislative authorization for its anticompetitive activity; and adequate state mandate would exist "when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' " *Id.* at 415 (quoting from *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1976).

This plurality opinion became the majority rule in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). The Court there applied the "clear articulation and affirmative expression" criterion to respondent city's ordinance imposing a moratorium on petitioners' proposed expansion of his cable-television business. The petitioner had challenged the ordinance on antitrust grounds and the city claimed immunity under *Parker*. The Court said that the ordinance could only be exempt if it constituted "the action of the State of Colorado itself in its sovereign capacity . . . or . . . municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy." *Id.* at 52. The immunity defense was rejected in *Boulder* when the city could point only to its "home rule" charter as legislative authority for its anticompetitive actions. The Court found that

the state, rather than clearly and affirmatively authorizing government regulation of cable service, was neutral on the issue.

Recently the Eight [sic] Circuit in *Gold Cross-Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005 (1983) said that an expression of state policy sufficient to establish *Parker* immunity was comprised of two elements: "The legislature must have authorized the challenged activity, and it must have done so with an intent to displace competition." *Id.* at 1011. The court applied this two-part test to Kansas City, Missouri's municipal ambulance service, under which a municipal trust contracted with a single private operator to provide all service within the city. Since Missouri had enacted a comprehensive regulatory scheme that expressly authorized a one-operator system, the court found the first test easily met. In deciding the more difficult second question whether or not Missouri intended to displace competition, the court explained that a sufficient state policy to displace competition existed if the challenged restaint [sic] was a necessary or reasonable consequence of engaging in the authorized activity. *Id.* at 1013. The court found that monopoly service was the necessary consequence of having only one operator as authorized by state law. In addition, the state had enacted its own anticompetitive scheme for regulating ambulance service, which applied in addition to municipal regulations. Thus, the court concluded, there was a clearly articulated and affirmatively expressed state policy authorizing their monopoly.

The district court in *Gold Cross* had concluded that the state action doctrine required that the challenged restraint be actively supervised by the state. *See, e.g.*,

California Liquor Dealers Ass'n. v. Midcal Aluminum, 445 U.S. 97 (1980). The appellate court disagreed, saying that where a municipality provides a traditional governmental function designed to protect public health and safety, such as ambulance service, and where municipal officials are politically accountable, state supervision is not as necessary to control abuse as it is when private persons are authorized to make anticompetitive decisions. *Gold Cross, supra*, 705 F.2d at 1014 & n.13. The court said that "[r]equiring state authorization for local conduct is analogous to requiring active supervision of private conduct; it tests whether challenged local activity is truly state action. . . . " *Id., quoting* Areeda, Antitrust Law, ¶ 212.2a at 47 (1982 Supp.).

Finally, the Eighth Circuit in *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419 (1983), found that the defendant agency qualified for the state action exemption. In that case, a municipal consortium was formed pursuant to state law to construct and operate a solid waste disposal site. The consortium issued revenue bonds to fund construction and in the bond contract pledged to require participating municipalities to refuse to grant any license to a competing plant. Plaintiff, a privately owned waste disposal company, sued, alleging that this exclusivity provision violated the antitrust laws.

The court conceded that no statute or authority indicated that the state legislature actually contemplated that the agency would have the exclusive right to dispose of solid waste or would act in restraint of trade. Nonetheless, the court inferred the existence of an affirmative state policy permitting the anticompetitive conduct from

three factors: first, the court relied on the high priority the legislature placed on activities of intergovernmental agencies in solid waste disposal and said the legislature must have intended such agency to have the broad authority needed to further the legislative mandate; second, the court said the legislature by affirmatively addressing the waste disposal issue and providing a wide range of options was not adopting an approach of "mere neutrality" as in *Community Communications, supra,* 455 U.S. at 55; and third, the court said that the legislature in authorizing revenue bond financing must have realized the importance of assuring a source of repayment to make the bonds marketable and must have intended that the agency have the power to impose restrictions on competition if necessary to sell the bonds. *Central Iowa Refuse Systems, Inc., supra,* 15 F.2d at 426-28.

Defendant City maintains that it has met the two-part *Gold Cross* test. The first prong of *Gold Cross* requires that the legislature must have *authorized the challenged activity.* The City contends that the Minnesota legislature established a system of state regulation of cable communication.

In its declaration of legislative findings and intent, the legislature states that "[i]t is the intent of the legislature in Sections 238.01 to 238.17 to vest authority in a board to oversee development of the cable communications industry in Minnesota in accordance with the statewide service plan; . . . " Minn. Stat. § 238.01. The Cable Communications Act requires that a cable communications system obtain a franchise from a municipality before operating within its boundaries. Minn. Stat. § 28.08. A municipality may grant a franchise only in

accordance with the rules and regulations promulgated by the Minnesota Cable Communications Board (Board). Minn. Stat. § 238.05 subd. 2(a). Those rules establish the procedures by which a franchise is granted. *See* 4 Minn. Code Agency R. § 4.140. Clearly, the first prong of *Gold Cross* has been met. The legislature has authorized the franchising of cable communications systems by municipalities.

The second prong of *Gold Cross* requires that the legislature must have authorized the challenged activity *with an intent to displace competition*. Defendant City contends that the legislature intended that competition between cable communications systems be displaced. The City points to the legislature's declaration of legislative findings and intent for support of its position. According to the City, the legislature's declaration acknowledged the interface between the cable industry and areas of state concern. The City also maintains that the legislature perceived that the public's interest in cable development might not correspond with the effects of free market competition by cable communications companies. Specifically, the legislature noted that the development of cable communications systems "should proceed in accord with state and regional service objectives; . . . [T]hese objectives should encourage area-wide service where consistent with the public interest and discourage concentration of control and ownership when not in the public interest; . . . " Minn. Stat. § 238.01. The City contends that further evidence of an intent to displace competition may be inferred from the express reservation of the right of a municipality to construct, purchase and operate a cable communications system. Minn. Stat. § 238.08 subd. 3.

Nor-West disagrees with the City and argues that the legislature did not intend to displace competition among cable communications systems. Specifically, Nor-West relies on Minn. Stat. § 238.05 subd. (2)(b), which mandates that the board shall not, contrary to applicable federal and state law, prescribe "a requirement that no such franchise may be exclusive." Nor-West also points to the declaration of legislative findings and interest, and notes the absence of any reference to the creation of unnatural monopolies or a suggestion that it would be in the public interest to exclude potential competitors. Instead, according to Nor-West, the legislative intent evidences a desire to foster the rapid growth of the cable communications industry in the state. *See* Minn. Stat. § 238.01.

While it is true, as Nor-West has suggested, that the legislature never specifically stated an intent to displace competition, such an intent can be inferred under the statute. *See Central Iowa Refuse, supra,* 715 F.2d 419. The declaration of legislative findings, and intent specifically acknowledges that cable communications systems must be developed with an eye towards balancing industries' desires against the public interest. The legislative and regulatory scheme permits municipalities to franchise in most any way they want, and thus they may exclude potential cable operators from a given market. Accordingly, based on a review of the parties' arguments and the statute and regulations, the court concludes that the legislature enacted Minn. Stat. Ch. 238 with an intent to displace competition.

Nor-West presents two other arguments against the state action doctrine. First, Nor-West contends that the

subject matter of this action concerns a first amendment activity rather than public utility service. In an attenuated argument, Nor-West suggests that *if* the statute were construed to create a monopoly in a forum of expression, it would be unconstitutional; unconstitutional statutes are void and of no effect; thus, this statute provides no basis for *Parker* immunity. Nor-West's argument is premised upon the unconstitutionality of Minn. Stat. Ch. 238, an issue that is not before the court. Further, the constitutionality of the statute is unrelated to application of the state action doctrine. Accordingly, the court finds no merit to this argument.

Second, Nor-West contends that, because it has alleged that the City acted in conspiracy with Kalba-Bowen and Continental to artificially and illegally monopolize the market, it should be allowed to prove the conspiracy. Among the conspiracy allegations, Nor-West claims that City officials acted for personal gain and acted beyond the scope of their authority. Amended Complaint ¶¶ 64, 65, 71, 72. Under this analysis, according to Nor-West, the motion to dismiss should be denied. *See, e.g., Cedar-Riverside Associates, Inc. v. United States,* 459 F. Supp. 1290, 1299 (D. Minn. 1978), *aff'd on other grounds sub nom. Cedar-Riverside Associates, Inc. v. City of Minneapolis,* 606 F.2d 254 (8th Cir. 1979).

Defendants argue that the conspiracy allegation does not preclude this court from dismissing the antitrust counts under the state action doctrine. First, defendants ask the court to take judicial notice of the findings of the Minnesota Cable Communications Board. *See In the Matter of the Application of Continental Cablevision of St. Paul, Inc. for a Regular Certificate of Confirmation of the St. Paul*

Cable Communications Franchise (Minn. Cable Communications Bd. Apr. 13, 1977), *aff'd, Cable Communications Board v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658 (Minn. 1984). In ¶ 67, the Board states that "[t]he franchise ordinance and the process leading to its adoption by the City, complied in all respects with Minn. Stat. Ch. 238 and Board rules adopted thereunder." Second, defendants argue that a mere allegation of personal gain is an insufficient basis for not applying the state action immunity doctrine. *Cf. First National Bank of Omaha v. Marquette National Bank of Minneapolis*, 482 F. Supp. 514, 521 (D. Minn. 1979) (absent allegations of illegality or unethical misconduct in instituting single lawsuit, defendants' conduct was not within the "sham exception" to the *Noerr-Pennington* doctrine).

The conspiracy issue in the context of the state action doctrine was recently analyzed in *Scott v. City of Sioux City, Iowa*, 736 F.2d 1207 (8th Cir. 1984). In *Scott*, the Eighth Circuit held that the state action doctrine shielded Sioux City from antitrust liability with respect to the city's contract with a private developer for a central city redevelopment project and the city's enactment of zoning ordinances limiting commercial development of the outlying areas of the city. The appellant landowners asserted that the city council acted outside state authorization and thus its actions were not immune from antitrust liability. The landowners alleged that the city's zoning decision was the product of an anticompetitive conspiracy between the city and a private developer rather than urban renewal policy. They further alleged that because the city council did not follow the procedures outlined in the urban renewal statute for amending the plan when it

passed the challenged ordinances, it forfeited state authorization. The Eighth Circuit rejected both contentions. *Id.* at 1214.

The alleged conspiracy in *Scott* involved discussions and dealings between the private developer and the city council relating to the zoning decision. The Eighth Circuit noted that antitrust immunity would be meaningless in this context unless it extended to the council's proper dealings with the private developer prior to the council's official zoning action. *Id.* at 1215. The court also concluded that the purposes of state action immunity would be frustrated if the mere label "conspiracy" were enough to warrant an antitrust trial, where there was no allegation that the council members were involved in bribery or other illegal acts. *Id.*

With regard to the alleged departure from state procedures, the *Scott* court noted that such a departure "would have to be extreme to warrant the threat of antitrust liability. State authorization for antitrust purposes does not require administrative decisions that are free from ordinary errors." *Id.* at 1215-16. In *Scott*, the alleged error was not of sufficient magnitude to necessitate abrogating the city's antitrust immunity. *Id.* at 1216.

The court also finds guidance from the United State [sic] Supreme Court's most recent pronouncement on the state action doctrine, *Hoover v. Ronwin*, 104 S. Ct. 1989 (1984). In *Hoover*, the court held that the grading of bar examinations by a committee appointed by, and according to, the Rules of the Arizona Supreme Court was exempt from Sherman Act liability under the state action doctrine. Justice Powell, writing for the majority,

criticized the reasoning of the dissent, which "would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign. Such a holding would emasculate the *Parker v. Brown* doctrine." 104 S. Ct. at 2001. The Court concluded that the district court properly dismissed the complaint for failure to state a claim upon which relief can be granted.

This court concludes that *Scott* and *Hoover* are analogous to the instant action and therefore dispositive of Nor-West's alleged conspiracy to violate the antitrust laws. Nor-West does not allege that any City officials were involved in bribery or other illegal acts. Kalba-Bowen, the City's private consultant, and Continental, a successful cable applicant, had legitimate reasons to discuss cable communication matters with City officials. As noted above, the Minnesota Cable Communications Board already has found that the City complied with state procedures. Accordingly, this court concludes that Nor-West's conspiracy allegations do not remove defendant's immunity from antitrust liability under the state action doctrine.

In the context of similar challenges to other state cable franchising systems, the state action doctrine has been applied to immunize municipalities from liability. *See, e.g., Catalina Cablevision Associates v. City of Tucson*, 745 F.2d 1266 (9th Cir. 1984); *Pacific West Cable Co. v. City of Sacramento*, No. S-83-1034 MLS (E.D. Cal. Apr. 25, 1984); *Preferred Communications, Inc. v. City of Los Angeles*, No. CV-83-5846-CBM (C.D. Cal. Mar. 5, 1984); *Acton CATV, Inc. v. City of Duarte*, No. CV-83-1018 RG (MCx)

(C.D. Cal. Feb. 28, 1984); *Century Federal, Inc. v. City of Palo Alto,* 579 F.Supp. 1553 (N.D. Cal. 1984). Based on these decisions and the above analysis, the court concludes that the defendants are immune from antitrust liability for the challenged conduct under the state action doctrine. Nor-West's antitrust claims will therefore be dismissed.

II. First Amendment Claim: Count 4

Defendants also seek to dismiss plaintiff's fourth claim for relief. In the fourth claim, Nor-West alleges that the franchising process, by restricting the number of cable television companies which are permitted to operate and use the public rights of way, infringes upon its first amendment right to free speech. The issue before the court is *not* whether cable communication system operators have first amendment rights to disseminate information, nor is the issue of cable television content before the court. Rather, the issue is whether Nor-West has a constitutional right to build and operate a cable communications system in the City irrespective of the franchising process. Nor-West's first amendment argument can be summed up in the same terms used by Judge Lynch to describe a similar argument in *Century Federal, Inc. v. City of Palo Alto,* 579 F. Sup. 1553 (N.D. Cal. 1984). It "essentially states that the business of CTV operating must be thrown open to virtually everyone with the inclination to enter the industry." *Id.* at 1561.

There is no doubt that cable operators are entitled to first amendment protection. *See Community Communications Corp. v. City of Boulder,* 660 F.2d 1370, 1376 (10th Cir.

1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1052-57 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43-51 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). The difficult question comes in determining what governmental regulations of cable [several words are illegible here].

Defendants contend that cable television can be regulated like the broadcast media. *See, e.g., Community Communication, supra*, 660 F.2d at 1378; *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Nor-West argues that cable television regulation is more analogous to the first amendment freedoms given to newspapers. *See, e.g., Midwest Video, supra*, 571 F.2d at 1055-56 (dictum); *Home Box Office, supra*, 567 F.2d at 44-46.

Nor-West suggests that *Midwest Video* is the controlling law in this circuit. *Midwest Video* concerned a challenge to FCC regulations imposing mandatory access and channel capacity requirements upon certain cable systems. In dicta, the Eighth Circuit addressed the first amendment issue: "[W]e have seen and heard nothing in this case to indicate a constitutional distinction between cable systems and newspapers in the context of the government's power to compel public access." *Midwest Video, supra*, 571 F.2d at 1056. This pronouncement by the Eighth Circuit is not controlling in this case. First, the statement is dicta. The court did not have to address the constitutional issue. Second, *Midwest Video* and the instant action are factually different. *Midwest Video* concerned content regulation, whereas this action concerns regulation of the construction and operation of a cable system.

Defendants' arguments focus on two contentions. First, that there is no first amendment right to construct and operate a cable system franchise, Second, that the City's franchising process is a legitimate exercise of the state's police power to minimize the disruptive use of the public domain. Nor-West contends that defendants' arguments are based on theories of physical scarcity and economic scarcity, which raise factual issues which cannot be decided on the pleadings alone.

Various district courts have faced the same issue which is before this court in the instant action, and the courts are divided. Motions to dismiss first amendment claims were denied in *Pacific West Cable Co. v. City of Sacramento*, No. 5-83-1034 MLS (E.D. Cal. Apr. 25, 1984) and *Century Federal Inc. v. City of Palo Alto, supra*, 579 F. Supp. 1553. Other courts have found no merit in the first amendment claim. *See, e.g., Preferred Communications, Inc. v. City of Los Angeles*, No. CV-83-5846-CBM (C.D. Cal. Mar. 5, 1984); *Acton CATV Inc. v. City of Duarte*, No. CV-83-1018 RG (MCx) (C.D. Cal. Feb. 28, 1984); *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F. Supp. 976 (D.R.I. 1983); *Hopkinsville Cable TV, Inc. v. Pennroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982).

This court finds the reasoning of these latter cases persuasive. As the Tenth Circuit stated in *Community Communications*, "[n]o individual disseminator has the constitutional right to be the particular person who obtains the privilege to use the medium." 660 F.2d at 1378. The state's power to minimize the disruptive use of the public domain permits the government to restrict access by prospective cable television operators. Again,

the Tenth Circuit commented on this aspect of cable franchising in *Community Communications*:

> [A] cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disruption, especially to streets, alleys, and other public ways. Some form of permission from the government must, by necessity, precede such disruptive use of the public domain. We do not see how it could be otherwise. A city needs control over the number of times its citizens must bear the inconvenience of having its streets dug up and the best times for it to occur.

660 F.2d at 1377-78 (footnote omitted). To this court, a city's selection of a franchisee to provide cable service to its community, based upon procedures outlined by state statute and regulations, raises no first amendment concerns.

Nor-West, a willing and unsuccessful participant in the City's cable franchise selection process, seeks relief under the guise of the first amendment. For the reasons stated above, no such relief is available. Accordingly, Nor-West's first amendment claim will be dismissed.

III. Due Process Claim: Count 1

Defendant City finally moves to dismiss Nor-West's first claim for relief. In that claim, Nor-West alleges that it was impermissibly deprived or property and liberty interests without due process of law.

Nor-West alleges it acquired a property interest in a cable francise [sic] when the City Council, on June 30,

1983, passed a resolution awarding a 15-year nonexclusive franchise to Nor-West. Amended Complaint ¶ 32. That resolution was subject to certain contingencies, including final approval by Nor-West, the City Council and the Mayor, and the issuance of a certificate of confirmation by the Minnesota Cable Communications Board. The resolution was later vetoed by the Mayor.

In order to establish a property interest in an award of a cable franchise, Nor-West must demonstrate a legitimate claim of entitlement by virtue of state law or agreement between the parties. *See Board of Regents v. Roth*, 408 U.S. 564 (1972). Certainly, the Minnesota Cable Communications Act provides no legitimate claim of entitlement to a cable franchise. As to the City Council resolution, this court concludes, because of the contingencies contained in the resolution, that Nor-West had nothing more than a unilateral expectation of a cable franchise. Nor-West did not acquire any contractual rights to a cable franchise by way of the City Council resolution. *See Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121 (Minn. 1980). Thus, this court concludes that Nor-West has failed to allege a constitutionally protected property interest in a cable franchise. Without such an interest, no property deprivation without due process could have occurred. Accordingly, this claim for relief will be dismissed.

Nor-West also alleges that it had a personal liberty interest in the award of a cable franchise based upon the first amendment. Amended Complaint ¶ 33. For the reasons discussed above regarding the first amendment claims, Nor-West does not have any legal entitlement to an award of a franchise by virtue of the first amendment.

Thus, Nor-West does not have a personal liberty interest in an award of a franchise. Without such an interest, no liberty deprivation without due process could have occurred. Accordingly, Nor-West's entire due process claim will be dismissed.

Based upon the foregoing,

IT IS ORDERED That the City's motion to dismiss the first, fourth, fifth and sixth claims for relief in Nor-West's amended complaint be and the same hereby is in all things granted and those claims are hereby dismissed.

IT IS FURTHER ORDERED That Continental's motion to dismiss the fourth, fifth and sixth claims of relief in Nor-West's amended complaint be and the same hereby is in all things granted and those claims are hereby dismissed.

DATED: December 26, 1984.

/s/ Donald D. Alsop
DONALD D. ALSOP
United States District Judge

APPENDIX 5

Order of May 10, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership,

Plaintiff,

v.

CITY OF SAINT PAUL, a City of the First Class, and KALBA-BOWEN ASSOCIATES, INC., a corporation,

Defendants,

and

CONTINENTAL CABLEVISION OF ST. PAUL, INC., a corporation,

Defendant in Intervention.

3-83 CIV 1228

MEMORANDUM ORDER

Smith, Juster, Feikema, Malmon & Haskvitz, by RONALD L. HASKVITZ, Esq., Minneapolis, Minnesota, and Farrow, Schildhause, Wilson & Rains, by ROBERT BRAMSON, Esq., Oakland, California, appeared for plaintiff.

Robins, Zelle, Larson & Kaplan, by ERNEST I. REVEAL, Esq., St. Paul, Minnesota, and EDWARD STARR, City Attorney, St. Paul, Minnesota, appeared for defendant City of St. Paul.

O'Connor & Hannan, by ROBERT A. BRUNIG, Esq., Minneapolis, Minnesota, appeared for defendant Continental Cablevision of St. Paul, Inc.

This matter comes before the court upon the motion of defendant City of St. Paul (City) and defendant in intervention Continental Cablevison of St. Paul, Inc. (Continental) to dismiss the second (civil rights/equal protection) and third (civil rights/conspiracy) claims of plaintiff's amended complaint for failure to state claims upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

I. Equal Protection Claim: Count 2

In its second claim for relief, Nor-West alleges that it was "similarly situated" to Continental and that both were "members of the class of persons known as cable television operators." Amended Complaint ¶ 38. Nor-West also alleges that the City's refusal to permit Nor-West to operate a cable television system on the same terms and conditions as Continental "constitutes an arbitrary and discriminatory classification which denies plaintiff equal protection under the law, and which restricts plaintiff's fundamental right to free speech." Amended Complaint ¶ 40.

Defendants contend that Nor-West's equal protection claim fails to state a cause of action. Defendants argue that the City's cable television franchising process need only satisfy the "rational basis" test to be valid under the equal protection clause. Nor-West has not alleged a classification based upon suspect criteria. Nor, according to defendants, is a fundamental right implicated because this court's order dated December 26, 1984 dismissed plaintiff's first amendment claim. Defendants therefore analogize the City's cable television franchising process to other municipal licensing systems. Thus, as long as the

franchising process is rationally related to a legitimate purpose within the government's police power, the equal protection clause is satisfied. Defendants maintain that the purpose of cable franchising is rationally related to the City's interest in minimizing the disruptive use of the public domain.

Nor-West, in contrast, argues that the rational basis test is inapplicable to its equal protection claim. Instead, Nor-West contends that the City's actions have implicated a fundamental right, namely, the first amendment, thus requiring use of the strict scrutiny test. Specifically, Nor-West alleges that the City's actions in the cable television franchising process led to arbitrary, discriminatory, and biased classifications which denied plaintiff's fundamental right to free speech in violation of the equal protection clause. In addition, Nor-West contends that this court's order dated December 26, 1984, which dismissed Nor-West's first amendment claim, did not address the issue as to whether the franchising process as applied in this case denied Nor-West's free speech rights in violation of the equal protection clause.

As noted above, this court held, in its order dated December 26, 1984, dismissing Nor-West's first amendment claim, that the City's cable television franchising process does not violate a first amendment right to free speech. As to Nor-West's contention that the cable television franchising process was unconstitutionally administered, the State Cable Communications Board has already determined that the City had properly and neutrally applied the procedures established by administrative rule, city ordinance and state law. *See In the Matter of the Application of Continental Cablevision of St. Paul, Inc. for a*

Regular Certificate of Confirmation of the St. Paul Cable Communications Franchise (Minn. Cable Communications Bd. Apr. 13, 1977), *aff'd, Cable Communications Board v. Nor-West Cable Communications Partnership,* 356 N.W.2d 658 (Minn. 1984). In sum, this court concludes as a matter of law that the City's cable television franchising process, neither on its face nor as applied, violated Nor-West's fundamental right to free speech.

This court faced a similar constitutional challenge to municipal licensing authority in *Minneapolis Auto Parts Co. v. City of Minneapolis,* 572 F. Supp. 389 (D. Minn. 1983), *aff'd after remand on other grounds,* 739 F.2d 408 (9th Cir. 1984). In that case, this court observed:

> Whenever a City Council uses its discretion to deny a license or permit in a given situation, it is possible to find another person who is granted such a license or permit under seemingly similar circumstances. To allow an action based on equal protection when plaintiffs are not members of a suspect class or when no fundamental rights are implicated, would be to provide plaintiffs with a federal remedy whenever an administrative body acts arbitrarily or capriciously. The Court of Appeals for the Eighth Circuit has held that such a remedy is not cognizable under § 1983 when plaintiffs allege violations of substantive due process. *See Buhr v. Buffalo Public School District No. 38,* 509 F.2d at 1201. This court sees no reason to treat plaintiffs' claim under the Equal Protection Clause any differently than it has plaintiffs' claim under the Due Process Clause since in this case the issue to be litigated would be the same in either instance – the reasonableness of the City Council's action.

Id. at 396. This same rational applies here.

To the extent that no fundamental right is implicated in this action, the court will analyze Nor-West's equal protection claim under the rational basis test. Under that test, the court concludes that the City's classifications are rationally related to a legitimate governmental purpose of minimizing the disruptive use of the public domain. Accordingly, Nor-West fails to state a claim under the equal protection clause and that claim will therefore be dismissed.[1]

II. Conspiracy Claim: Count 3

In its third claim for relief, Nor-West alleges that certain representatives of the City, along with Kalba-Bowen, "have conspired to and have denied plaintiff rights guaranteed to it under the first and fourteenth amendments to the United States Constitution." Amended Complaint ¶ 45. According to Nor-West, in its brief opposing this motion, Nor-West's civil rights/conspiracy claim is asserted under 42 U.S.C. § 1983. Accordingly, defendants' discussion in their brief supporting

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[1] In addition, Nor-West contends that the amended complaint also alleges facts for a different violation of the equal protection clause. Nor-West alleges that the City classified cable television companies differently from other businesses using public rights of way. Although these allegations do not appear specifically within Nor-West's second claim for relief, the court will address them here. As with Nor-West's other equal protection claim relating to classifications of cable television operators, the court concludes that the City's classifications, under the rational basis test, were rationally related to a legitimate government purpose. Accordingly, this equal protection claim will also be dismissed.

this motion of the need for "race-or class-based animus" under 42 U.S.C. § 1985(3) will not be addressed.

Plaintiff and defendants all agree that an allegation of conspiracy alone does not state a cause of action under § 1983. In order to state a valid civil rights/conspiracy claim under § 1983, plaintiff must also allege that the conspiracy deprived plaintiff of rights secured by the constitution and laws. *See Goldschmidt v. Patchett*, 686 F.2d 582 (7th Cir. 1982); *Safeguard Mutual Insurance Co. v. Miller*, 477 F. Supp. 299 (E.D. Pa. 1979). Nor-West contends that it has properly alleged both a conspiracy and a denial of its first amendment rights. This court, however, has concluded in this order and in its order dated December 26, 1984 that plaintiff has failed to state a claim for the violation of any substantive constitutional rights under either the first amendment or the fourteenth amendment. To the extent that plaintiff's amended complaint fails to state a claim for relief based on the violation of any substantive constitutional rights, plaintiff's civil rights/conspiracy claim also fails to state a claim upon which relief can be granted. Accordingly, Nor-West's civil rights/conspiracy claim will be dismissed.

Based upon the foregoing,

IT IS ORDERED That the motion of defendants City and Continental to dismiss the second and third claims for relief in Nor-West's amended complaint be and the same hereby is in all things granted and those claims are hereby dismissed.

DATED: May 10, 1985.

/s/ Donald D. Alsop
DONALD D. ALSOP
United States
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

(seal)

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership,

Plaintiff,

v.

CITY OF SAINT PAUL, a City of the First Class, and KALBA-BOWEN ASSOCIATES, INC., a corporation,

Defendants,

and

CONTINENTAL CABLEVISION OF ST. PAUL, INC. a corporation,

Defendant in Intervention.

3-83 CIV 1228

MEMORANDUM ORDER

This matter comes before the court upon defendant Kalba-Bowen Associates, Inc.'s (Kalba-Bowen) motion to join in the motions of defendant City of St. Paul (City)

and defendant in intervention Continental Cablevision of St. Paul, Inc. (Continental) to dismiss the first, second, third, fourth, fifth and sixth claims for relief in plaintiff's amended complaint. Defendants oppose the motion. Both sides rely on the arguments proffered in the previous motions of the City and Continental. The motion has been submitted without oral hearing based upon the previous arguments and memoranda of counsel. Fed. R. Civ. P. 78.

Based upon the reasoning in this court's orders dated December 26, 1984 and May 10, 1985, the court will grant Kalba-Bowen's motion.

Accordingly,

IT IS ORDERED That Kalba-Bowen's motion to join in the motions of the City and Continental to dismiss the first, second, third, fourth, fifth and sixth claims for relief in Nor-West's amended complaint be and the same hereby is granted, and those claims are hereby dismissed as to Kalba-Bowen.

DATED: May 10, 1985.

/s/ Donald D. Alsop
DONALD D. ALSOP
United States
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

(seal)

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership,

Plaintiff,

v.

CITY OF SAINT PAUL, a City of the First Class, and KALBA-BOWEN ASSOCIATES, INC., a corporation,

Defendants,

and

CONTINENTAL CABLEVISION OF ST. PAUL, INC. a corporation,

Defendant in Intervention.

3-83 CIV 1228

MEMORANDUM ORDER

Based upon the previous orders of this court, all claims against all defendants in this action have been dismissed.

Accordingly,

IT IS ORDERED That the Clerk enter judgment as follows:

> IT IS ORDERED, ADJUDGED AND DECREED That the plaintiff have and recover nothing of the defendants and the action is dismissed with prejudice.

DATED: May 10, 1985.

/s/ Donald D. Alsop
DONALD D. ALSOP
United States
District Judge

CIV 31
Rev 7/82) JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT	DISTRICT Minnesota
CASE TITLE NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, v. CITY OF ST. PAUL, KALBA-BOWEN ASSOCIATES, INC. & CONTINENTAL CABLEVISION OF ST. PAUL, INC.	DOCKET NUMBER 3-83-1228 NAME OF JUDGE OR MAGISTRATE Alsop-J

[ ] **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

IT IS ORDERED, ADJUDGED AND DECREED That the plaintiff have and recover nothing of the defendants and the action is dismissed with prejudice.

CLEAR

FRANCIS E. DOSAL

(BY) DEPUTY CLERK

/s/ Judy Fisher

DATE

5-10-85

APPENDIX 6

Order of Dec. 1, 1986

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership,
Plaintiff,

v.

CITY OF SAINT PAUL, a City of the First Class, and KALBA-BOWEN ASSOCIATES, INC., a corporation,

Defendants,

and

CONTINENTAL CABLEVISION OF ST. PAUL, INC., a corporation,

Defendant in Intervention.

3-83 CIV 1228
ORDER
(Filed Dec. 1, 1986)

This matter comes before the court upon remand from the Eighth Circuit Court of Appeals in an order dated July 3, 1986. *Nor-West Cable Communications v. City of Saint Paul, et al.*, No. 85-5193, slip op. (8th Cir. July 3, 1986). The remand was ordered in light of the recently decided Supreme Court case of *City of Los Angeles v. Preferred Communications, Inc.*, ___ U.S. ___, 106 S.Ct. 2034 (1986). The Court of Appeals vacated the entire judgment of dismissal issued by this court.

In three separate orders dated December 26, 1984, December 26, 1984, and May 10, 1985, this court disposed of the plaintiff's civil action by denying, in part, the plaintiff's request for leave to amend its complaint and dismissing all of the counts of the amended complaint. The Eighth Circuit has instructed the court to "reassess its evaluation of all claims stated in light of *Preferred Communications*. . . . " *Nor-West Cable*, No. 85-5193, slip op. at 2. The Eighth Circuit acknowledged, however, that *Preferred Communications* involved an appeal solely on First Amendment grounds. Finally, the Eighth Circuit stated that "[i]n the event that the trial court finds that *Preferred Communications* does not affect some of the previously dismissed claims, then it is at liberty to enter its judgment based upon its initial reasoning in the judgment of dismissal from which the present appeal was filed." *Id.*

In response to the Eighth Circuit remand, this court has reviewed its previous dismissal orders, the memoranda submitted on behalf of the parties, and the relevant case law, including *Preferred Communications*. The court concludes that *Preferred Communications* does not affect the court's dismissal of the plaintiff's due process, § 1983, and Sherman Act claims. Moreover, the plaintiff has failed to cite any other authoritative case law decided subsequent to the court's orders that affects or modifies the court's prior analysis or decisions.[1] Consequently, it is

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[1] Indeed, the relevant case law decided subsequent to this court's orders have generally supported the court's prior analysis and decisions. *See, e.g., Holmberg v. Morrisette, et al.*, Nos. 85-5138, 85-5221 (8th Cir. Sept. 3, 1986) (restrictive view of "pattern" as used in the RICO statute); *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986) (same).

the court's view that the plaintiff' clams based upon violations of due process, §§ 1 and 2 of the Sherman Act, and 42 U.S.C. § 1983 were properly dismissed by this court and those claims are again dismissed based upon the court's reasoning in its respective orders dated December 26, 1984 and May 10, 1985. For the same reasons, the court reaffirms its earlier decision denying the plaintiff leave to amend, which prevented the plaintiff from asserting a RICO and breach of contract claim. Following this order, the remaining counts of the plaintiff's amended complaint are count two (equal protection) and count four (first amendment).

Based upon the record as presently constituted and the foregoing discussion,

IT IS ORDERED That the defendants' motion to dismiss the first (due process), third (§ 1983), fifth (§ 2 of Sherman Act), and sixth (§ 1 of Sherman Act) counts of the plaintiff's amended complaint be and the same hereby is in all things granted and those claims are hereby dismissed.

IT IS FURTHER ORDERED That the plaintiff's motion to amend its complaint to add a RICO and breach of contract claim be and the same hereby is in all things denied.

DATED: December 1, 1986.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U. S. District Judge

APPENDIX 7

UNITED STATES CONSTITUTION
ARTICLE III

ARTICLE III – THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the Untied States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different State, – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[1]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be

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[1] This clause has been affected by the Eleventh Amendment.

Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

APPENDIX 8

UNITED STATES CONSTITUTION
FIRST AMENDMENT

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX 9
ORIGINAL COMPLAINT

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Nor-West Cable Comunications Parnership, a General Partnership,

Plaintiff,

vs.

City of St. Paul, a City of the First Class,

Defendant.

Civil File No. 4-83-775

COMPLAINT

Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted against the above-named defendant pursuant to section 4 of the Clayton Act (15 U.S.C. §15) to recover damages for injury sustained by plaintiff to its business and property resulting from defendant's violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2), and to redress the deprivation under color of law of rights secured by the United States Constitution, pursuant to 42 U.S.C. §1981, and §1983. Jurisdiction is conferred on this Court by 28 U.S.C. §1343, 1337 and 1331. To the extent that this Complaint involves state claims, this Court has pendent jurisdiction of those claims.

2. Venue exists in this District under 28 U.S.C. §1391(b)(c), and 15 U.S.C. §22.

3. Plaintiff seeks injunctive relief and treble damages.

FIRST CLAIM FOR RELIEF

RESTRAINT OF TRADE AND MONOPOLY

4. Plaintiff is a general partnership consisting of Harold Roitenberg, James Lupient, Wilbur C. Keefer, Roland A. Stinski, Wenda Weeks Moore, Cornell L. Moore, Jeanne Carol Sandberg, Joseph P. Lombardo, Dr. William F. Mazzitello, Patrick H. O'Neill, Joseph T. O'Neill, and O'Neill, Burke, and O'Neill Firm, with its principal place of business in St. Paul, Minnesota.

5. The City of St. Paul ("the City") was at all times herein mentioned, and is now, a city of the first class existing under and by virtue of the laws of the State of Minnesota.

6. On or about June 19, 1979 the City submitted a proposal to the Minnesota Cable Communications Board ("the Board") to approve the City's corporate boundaries as a cable service territory; the proposal was approved by the Board in October, 1979.

7. On or about June 10, 1982, the Mayor of the City publicly represented that the City Council ("the Council") would have full and final authority to grant cable communication ("CATV") franchises.

8. On August 6, 1982, the City entered into an agreement with Kalba-Bowen Associates, Inc. of Cambridge, Massachusetts ("Kalba-Bowan"), retaining Kalba-

Bowen to aid the City in evaluating applicants for CATV franchises.

9. On or about October 28, 1982, the Council adopted a Resolution that a Request for Proposals ("RFP") be sent out to seek qualified applicants to provide cable communications service in the City; the Mayor approved the Resolution on November 1, 1982.

10. The RFP was prepared by Kalba-Bowen and contains information and instructions relating to the preparation and filing of proposals, conditions and provisions regarding the installation, operation and maintenance of a cable communications system, and the procedure to be used in evaluating proposals.

11. The City instructed Kalba-Bowen to make an independent evaluation of the proposals submitted by applicants in response to the RFP.

12. An RFP was issued by the City, inviting qualified applicants to submit proposals to provide CATV to the City in accordance with requirements stated in the RFP, pursuant to a 15-year, non-exclusive franchise.

13. The RFP represented that the authority to grant CATV franchises resided with the Council, and that final selection of franchisees would be made by the Council.

14. The RFP set forth specific criteria and priorities on which applications for a CATV franchise would be evaluated.

15. On or about December 10, 1982, plaintiff filed a letter indicating its intent to apply for a CATV franchise,

and subsequently paid substantial sums for the preparation of a proposal in reliance on the representations made in the RFP.

16. Plaintiffs' application for a CATV franchise was complete in all respects and complied fully with the RFP.

17. The City received other applications for a CATV franchise, none of which complied with the requirements of the RFP.

18. On April 5, 1983, Kalba-Bowen issued its "Preliminary Assessment" of all the Proposals submitted in response to the RFP.

19. On June 15, 1983, Kalba-Bowen submitted its "Evaluation of Cable Communications Franchise Proposal".

20. On June 30, 1983, the Council concluded that plaintiffs' application for a CATV franchise met the requirements of the RFP and Minnesota Cable Communications Act ("the Act"), and directed the City Attorney to prepare a Resolution approving the issuance of a CATV franchise to plaintiff.

21. By Resolution duly adopted on July 5, 1983, the City decided to issue a CATV franchise to plaintiff, subject to certain conditions. The Resolution is attached hereto as Exhibit A and is incorporated herein by reference as though fully set forth.

22. On or about July 13, 1983, the Mayor purported to veto the Council's July 5, 1983 Resolution.

23. On July 29, 1983, the City refused to issue a CATV franchise to plaintiff, but on said date the City

decided to issue a CATV franchise to another applicant, whose Proposal did not comply with the requirements of the RFP.

24. Plaintiff has a property interest in the award of a CATV franchise by the City and plaintiff has the right to be treated fairly and without discrimination.

25. Defendant treated plaintiff unfairly by granting preferential treatment to others and by refusing to grant a franchise to the plaintiff while deciding to give a franchise to another applicant who failed to meet the requirements of the RFP.

26. The defendant's award of a franchise to another applicant who failed to meet the requirements of the RFP while refusing to grant a franchise to plaintiff who met all the requirements of the RFP was the result of a preconceived plan favoring another applicant and made a sham of the process required by the RFP.

27. The City's decision to grant a franchise to another while refusing to grant a franchise to plaintiff constituted an unlawful preference and denied equal protection to the plaintiff.

28. Said denial of equal protection, unlawful preference, and unfair treatment resulted from the acts of the City through agents, employees, representatives and elected officials, acting in concert, and conspiring with each other, by at least but not limited to the following conduct:

A. Engaging in one or more meetings and discussions with representatives of other applicants to the exclusive of the plaintiff for the

purpose of providing other applicants an unfair and unlawful opportunity;

B. Offering advice and information to other applicants for the purpose of aiding them in preparing their Proposals while failing to give such advice and information to the plaintiff;

C. Failing to make known errors and omissions in the Proposals of other applicants;

D. Failing to make known the fact that Kalba-Bowen's evaluation contained errors and omissions concerning the plaintiff's Proposal and making no attempt to correct known inaccuracies, errors and omissions in the Kalba-Bowen report with respect to the plaintiff;

E. Providing incorrect information to the Mayor and members of the Council and making the Kalba-Bowen report or reports available to other applicants for their use and information in the preparation of their Proposals before making such report or reports of Kalba-Bowen available to the plaintiff and the Council;

F. Offering information and advice to other applicants that aided them in the preparation of their Proposals while failing to give such information and advice to the plaintiff;

G. Failing to point out errors and omissions in the Proposals of other applicants;

H. Giving advice, information and assistance to other applicants by telling them things that should be put into their Proposals or should be omitted from their Proposals while failing to give the same or similar advice, assistance and information to the plaintiff.

29. The Mayor's veto of the Council's July 5, 1983 Resolution was arbitrary and capricious, unlawful, unconstitutional and void.

30. The City's refusal to issue a CATV franchise to plaintiff whose Proposal met all requirements of the RFP, is arbitrary and capricious, unconstitutional, unlawful and void.

31. By Resolution adopted on July 29, 1983, the City has decided to issue an exclusive CATV franchise to Continental Cablevision of St. Paul in violation of the City Charter, Minn. Stat. §238.05 and the Cable Communication Rules adopted thereunder.

32. Providing CATV involves the doing of business in interstate commerce.

33. Plaintiff is ready, willing and able to province CATV to the City of St. Paul.

34. Defendant has at all relevant times known that plaintiff is ready, willing and able to provide CATV to the City of St. Paul, and has also known of plaintiff's expenditures and efforts for that purpose.

35. The City, and certain of its elected officials, officers and agents, have knowingly, willfully and unlawfully combined, conspired and agreed among themselves, and others, to monopolize, to attempt to monopolize and to unreasonably restrain trade and commerce by conspiring to impair and/or destroy plaintiff's right to construct and operate a CATV in the City of St. Paul, all in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2.

36. The conspiracy involved herein consists of a continuing agreement, a tacit understanding and a concert of action between the City and its elected officials, officers, agents and employees to severely limit and

restrict competition in and free access to the installation, operation and maintenance of CATV in the City of St. Paul.

37. Said continuing agreement, tacit understanding and concerted action was undertaken for the purpose of denying consumers a reasonable choice and allocating a division of the market, all in violation of Sections 1 and 2 of the Sherman Act.

38. Said continuing agreement, tacit understanding and concert action was entered into with the specific purpose and intent to arbitrarily, unlawfully, unreasonably and knowingly, create, or attempt to create a monopoly through the elimination of fair competition by granting an exclusive franchise, whereby the franchisee selected is protected and sheltered from price competition and is allowed to monopolize or attempt to monopolize distribution of CATV in interstate commerce in the City of St. Paul.

39. Said actions of the defendant were taken for anti-competitive purposes and effect, and as such constitute a conspiracy to unreasonably restrain trade in the relevant product market of CATV services and in the relevant geographic market of the City of St. Paul. Said anti-competitive actions further constitute a group boycott or concerted refusal to deal, and thereby constitute a *per se* violation of Section 1 of the Sherman Act.

40. As a direct and proximate result of the above-described acts and practices of defendant, and its co-conspirators, competition in the relevant product market and geographic market will be lessened, and a monopoly

will be created by unfair means, all to the detriment and destruction of competition in the relevant markets.

41. The violations of the antitrust laws alleged above directly affect and restrain interstate commerce.

42. As a result of the arbitrary, capricious and unlawful activity of the defendant, and above-mentioned violations of the anti-trust laws and other illegal actions of defendant and its co-conspirators, plaintiff has and will suffer damages in the amount of at least fifteen million dollars.

43. The acts and conduct of the defendant as herein alleged have caused, and will, unless restrained, continue to cause plaintiff immediate and irreparable injury, and plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays for judgment as hereinafter set forth.

SECOND CLAIM FOR RELIEF
SECTION 1983 CLAIMS

44. Plaintiff incorporates by reference paragraphs 1 through 43 as if fully set forth herein, and further alleges as follows:

45. The action of the defendant acting under color of authority conferred on it by law, deprived plaintiff of rights and privileges which the Constitution and laws of the United States provide equally to all persons and impairs and deprives plaintiff of its rights under the equal protection and due process clauses of the Fourteenth Amendment, in violation of 42 U.S.C. §1983.

46. Plaintiff is entitled to reasonable attorney's fees and costs in this action, pursuant to 42 U.S.C. §1988.

WHEREFORE, plaintiff prays for judgment as hereinafter set forth.

THIRD CLAIM FOR RELIEF
VIOLATION IF FIRST AMENDMENT

47. Plaintiff incorporates by reference paragraphs 1 through 43 as if fully set forth herein, and further alleges as follows:

48. CATV is not a public utility. It is a non-broadcast facility which disseminates news, information, and entertainment to subscribers for a fee by (a) rebroadcasting signals originating at commercial or public broadcasting stations, (b) transmitting programming specially produced for CATV subscribers, and not available on commercial and public broadcasting stations, and (c) producing original programming in its own studios which is disseminated only to subscribers of cable television.

49. CATV consists of extensive equipment, including antennas, headend and hubs, local origination and access equipment, earth satellite receiving stations; amplifiers, coaxial cable, fibre optic cable, drops, subscriber premises equipment; said CATV systems runs over public and private property pursuant to rights obtained by contract, delivering service to each subscriber.

50. The express purpose of the aforesaid actions of the defendant was to prevent plaintiff from lawfully

engaging in the business of disseminating news, information, and entertainment, and to give plaintiff's competitors a competitive advantage over plaintiff.

51. The express purpose of the City's actions in denying plaintiff a permit to construct and operate CATV in the City of St. Paul is to preclude plaintiff from disseminating news, information, entertainment, and ideas and to expressly favor plaintiff's competitor as an alternative speaker. The City's actions have violated plaintiff's guaranty of Freedom of Speech and Press.

WHEREFORE, plaintiff prays for judgment as hereinafter set forth.

FOURTH CLAIM FOR RELIEF

VIOLATION OF FIFTH AND FOURTEENTH AMENDMENTS

52. Plaintiff incorporates by reference paragraphs 1 through 43 as if fully set forth herein, and further alleges as follows:

53. Defendant refused to issue plaintiff a CATV franchise even though plaintiff met all requirements for such a franchise.

54. The failure to grant plaintiff a CATV franchise was unreasonable, arbitrary and capricious, and deprived plaintiff of rights and privileges secured to it by the Fifth and Fourteenth Amendments to the Constitution of the United States, and the laws of the United States.

55. Plaintiff is entitled to reasonable attorney's fees and costs in this action, pursuant to 42 U.S.C. §1988.

WHEREFORE, plaintiff prays for judgment as hereinafter set forth.

FIFTH CLAIM FOR RELIEF
INVALIDITY OF AWARD TO CONTINENTAL

56. Plaintiff incorporates by reference paragraphs 1 through 43 as if fully set forth herein, and further alleges as follows:

57. Continental's proposal for a CATV franchise was deficient and did not comply in material and significant respects with the RFP.

58. The defects in Continental's application rendered its proposal invalid, thus making Continental's proposal ineligible for consideration by the City and making the consideration of it unlawful.

59. The procedure followed by the City in granting a CATV franchise to Continental will have the effect of granting an exclusive franchise, contrary to the City Charter, the Act, and the Regulations adopted by the Board, all of which expressly prohibit the granting of an exclusive franchise.

WHEREFORE, plaintiff prays for judgment as hereinafter set forth.

SIXTH CLAIM FOR RELIEF
INVALIDITY OF MAYOR'S VETO

60. Plaintiff incorporates by reference paragraphs 1 through 43, as if fully set forth herein, and further alleges as follows:

61. The Mayor's veto of the Council's Resolution of July 5, 1983 was void and should be set aside because:

(a) The Council had the exclusive authority on the selection of CATV franchisees.

(b) The Resolution of July 5, 1983 was an administrative act in the process leading to the grant of a CATV franchise which by law can be granted only by Ordinance.

(c) The Mayor's veto was an unlawful interference with the Council's administrative process.

(d) The Mayor waived his veto power by publicly stating that the Council shall make final decision on granting CATV franchises.

(e) The Mayor announced that he waived any veto power he might have had over granting CATV franchises, for the purpose of inducing the plaintiff to submit a Proposal in response to the RFP.

(f) The plaintiff submitted its Proposal for a CATV franchise in reliance upon the Mayor's promise that he would not exercise any veto power.

(g) The Mayor breached his promise not to veto Council's action concerning CATV franchises.

(h) The City is estopped from claiming that the Mayor's veto had any effect on the Council's Resolution of July 5, 1983.

(i) The Mayor's veto of the Resolution of July 5, 1983 was arbitrary and capricious, based on incorrect information and a lack of knowledge of plaintiff's Proposal, and was based on considerations and criteria not included in the RFP.

WHEREFORE, plaintiff prays:

(a) For judgment against defendant for injuries and damages suffered by plaintiff that may be shown or ascertained, believed to be at least fifteen million dollars ($15,000,000) and that said damages be trebled as provided by Section 4 of the Clayton Act;

(b) For judgment against defendant for any other injuries and damages that may be shown or ascertained to have been suffered by plaintiff;

(c) For judgment ordering defendant to pay the plaintiff the full cost of this action, including reasonable attorney's fees;

(d) For an injunction enjoining the defendant from taking any action to grant a CATV franchise to Continental or any other person, unless and until a CATV franchise is granted to the plaintiff;

(e) For an Order holding and directing the defendant's grant or decision to grant a CATV franchise to Continental is void;

(f) For an injunction forbidding the defendant from impairing or in any way interfering with plaintiff's construction or operation of a CATV system in the City of St. Paul;

(g) For an Order directing the City to grant plaintiff a 15-year, non-exclusive franchise to construct and operate a CATV system in the City of St. Paul;

(h) For an Order determining that the Council Resolution of July 5, 1983 is valid and in force, and ordering that the Mayor's veto thereof is void;

(i) For trial by jury;

(j) For such other relief as the Court may deem fitting, just, proper and equitable.

/s/ William S. Rosen
William S. Rosen
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227-7731

/s/ Ronald L. Haskvitz
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APPENDIX 10

AMENDED COMPLAINT

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership, Plaintiff, v. CITY OF SAINT PAUL, a City of the First Class; and KALBA-BOWEN ASSOCIATES, INC., a corporation, Defendants.	Civ. File No. 3-83-1228 AMENDED COMPLAINT FOR CIVIL RIGHTS ACT VIOLATIONS, INCLUDING FIRST AMENDMENT, DUE PROCESS AND EQUAL PROTECTION VIOLATIONS; SHERMAN ACT VIOLATIONS; FOR DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF [JURY DEMANDED]

CONTINENTAL CABLEVISION OF ST. PAUL, INC., a corporation,

Defendant in Intervention

Plaintiff, Nor-West Cable Communications Partnership, a general partnership, brings this amended complaint against defendant, City of Saint Paul, a City of the First Class, against defendant Kalba-Bowen Associates, Inc., a corporation, requests a trial by jury, and alleges as follows:

1. Plaintiff Nor-West Cable Communications Partnership (hereinafter "Nor-West") is a general partnership with its principal place of business in the City of Saint Paul, Minnesota.

2. Defendant City of Saint Paul ("the City") is a City of the First Class existing under the laws of Minnesota.

3. Plaintiff is informed and believes, and thereon alleges, that defendant Kalba-Bowen Associates, Inc. ("Kalba-Bowen") is a corporation with its principal place of business in Cambridge, Massachusetts.

4. Plaintiff is informed and believes, and thereon alleges, that defendant in intervention, Continental Cablevision of Saint Paul ("Continental"), is a Minnesota Corporation which is a wholly owned subsidiary of Continental Cablevision, Inc., a Massachusetts corporation.

5. The First, Second, Third and Fourth Claims herein arise under the Civil Rights Act (42 U.S.C. Section 1983). Jurisdiction over these claims is conferred on this Court by 28 U.S.C. Sections 1331, 1343, 2201, and 2202.

The Fifth and Sixth Claims herein arise under the Sherman Act (15 U.S.C. Sections 1 and 2) and are brought pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. Sections 15 and 26). The Court has jurisdiction over these claims pursuant to 28 U.S.C. Section 1337.

PRELIMINARY ALLEGATIONS

6. Plaintiff has, at all relevant times, desired to operate a cable television system within the boundaries of the City of Saint Paul. It has been ready, willing and able to operate such a system; it presently possesses the technical, financial and managerial abilities necessary to do so; and it has expended considerable effort and significant sums of money in preparing to enter the Saint Paul cable television market. However, it has been wrongfully prevented from operating such a system by the defendants, and each of them.

7. A cable television company, as a member of the press, competes with other mediums of communication in the general market for dissemination of news, information, and entertainment. Cable programming competes with the traditional media (e.g., AM & FM radio, movies, theatres, newspapers and magazines), as well as with other television-related means of dissemination (e.g., UHF & VHF broadcast television, multipoint distribution systems, satellite master antenna television, low power television, coded subscription television, direct broadcast satellite, and video cassettes and discs.) In addition, because the utility poles or conduits located in Saint Paul

can carry numerous cable simultaneously, direct competition between different cable companies in the same geographic area within St. Paul is both technologically and economically feasible.

8. Recognizing the above, plaintiff has never demanded an exclusive right to operate a cable television system within Saint Paul. Rather, plaintiff simply desires the opportunity to provide cable television programming to residents of Saint Paul, and it has always been – and remains – prepared to compete fairly with any other person or persons who might wish to do so.

9. In connection with its desire to provide cable television programming to Saint Paul residents, plaintiff sought to learn the method for obtaining any permits, licenses or franchises which the City deemed necessary before operating a cable television system within Saint Paul. Plaintiff cooperated fully with the City in this respect, but as is detailed below, its cooperation resulted only in the wrongful refusal of defendants to permit plaintiff to provide cable television services at all.

10. Sometime during or before 1979, the City first began to consider requests by cable television companies to provide cable television programming to persons residing within Saint Paul. However, the City did not simply assess the health and safety needs of its residents and pass uniform standards to protect those needs, as it has done for other businesses. Instead, plaintiff is informed and believes, and thereon alleges, that the City arbitrarily decided to restrict the number of cable television companies within Saint Paul to one and one only.

11. In late 1979, the City issued a Request For Proposals (RFP), designed to elicit responses from various prospective cable television operators, thus permitting the City to choose whichever *one* it liked the most.

12. In response to this RFP, at least seven different cable companies expressed the desire to operate cable television systems within Saint Paul. However, on May 4, 1981, the City decided that it would exclude *all* cable companies and operate its own system. Thus, none of the seven were at that time permitted to operate cable companies within the city limits.

13. One year later, on or about April 27, 1982, the City again reversed itself, and abandoned the concept of municipal ownership.

14. On August 6, 1982, the City retained defendant Kalba-Bowen, a self-styled "cable consultant", to aid it in its subsequent dealings with cable companies.

15. Plaintiff is informed and believes, and thereon alleges, that the City – acting on the advice of Kalba-Bowen – for a second time decided arbitrarily to limit the number of cable companies within Saint Paul to *one*. In furtherance of this end, Kalba-Bowen offered to devise a second RFP and to evaluate the proposals received in response thereto.

16. On or about November 1, 1982, the City issued an RFP document devised by Kalba-Bowen. Plaintiff is informed and believes, and thereon alleges, that Kalba-Bowen conceived and devised the RFP in such a way as

to insure that Kalba-Bowen itself would receive substantial portions of the filing fees and other sums of money required to be paid by those who submitted proposals.

17. Thereafter, when plaintiff sought to begin operation of its cable television system, it was informed by defendants that under no circumstances would it be permitted to do so unless and until it participated in the recently established RFP process.

18. Defendants represented to plaintiff, as well as to other cable companies, that the RFP process would be conducted fairly, impartially and in good faith. In addition, the Mayor of Saint Paul represented that the City Council would have full and final authority in deciding with whom the City would contract for cable television services, and that participants in the RFP process should look to the City Council and not to the Mayor for such a decision. In addition, the RFP documents mandated the Council, not the Mayor, to evaluate the proposals and select a company to whom a franchise would be awarded. In reliance upon those representations, and believing that it had no other choice if it wanted to be a cable television operator within Saint Paul, plaintiff cooperated with defendants' RFP process.

19. The RFP itself consisted of a 206-page document setting forth the various requirements, demands and conditions which the City required interested cable television companies to contractually accept as a prerequisite to being considered for selection. Any company wishing to participate in the RFP process also had to pay the City $10,000.00 as a prior condition to such participation.

20. Believing that it was required to comply with the City's RFP process in order to receive a license or franchise from the City, and in reliance upon the City's and Kalba-Bowen's representations, plaintiff expended substantial sums of money and great effort to prepare and timely submit a response to the RFP.

21. Plaintiff's proposal was in full compliance with the RFP and was accepted as such by the City. After detailed study, the City Council concluded that plaintiff's proposal was superior to the other proposals received by the City. Therefore, on or about June 30, 1983, the City Council adopted a resolution to enter into a contract with Nor-West on July 5, 1983.

22. However, soon thereafter – despite previous public representations to the contrary – the Mayor announced that he would "review" the Council's decision to award a non-exclusive cable television franchise to Nor-West.

23. On or about July 13, 1983, the Mayor purported to veto the Council's July 5, 1983 resolution awarding a non-exclusive franchise to Nor-West. The Mayor's published veto message, in which he offered reasons for his action, contained many factual errors and omissions which had been propagated by the City's communications officer and defendant Kalba-Bowen, but rejected by the Council earlier in the process.

24. Plaintiff is informed and believes, and thereon alleges, that the Mayor's decision to undertake a "review" of the Council's decision to enter into a contract with Nor-West, and his subsequent "veto" of that contract, were products of a pre-existing conspiracy between

Kalba-Bowen, the City's communications officer, and others as yet unknown, the object of which conspiracy was to bias the RFP process against Nor-West and ultimately to prevent Nor-West from obtaining the opportunity to provide cable television services to residents of Saint Paul. Plaintiff is informed and believes, and thereon alleges, that acts taken in furtherance of this conspiracy include, but are not limited to, the following:

A. Preparing assessments of the several proposals which were based upon knowingly false and misleading factual assertions highly prejudicial to Nor-West, and which concealed deficiencies in the bids of other applicants.

B. Holding one or more meetings with representatives of other companies for the purpose of "coaching" their bids, while refusing to give similar advice, information and assistance to Nor-West.

C. Failing to incorporate, respond to, or even publicly acknowledge, receipt of reports submitted by Nor-West rebutting the distortions in the preliminary assessment.

D. Changing criteria of the RFP for the purpose of biasing the evaluation against Nor-West.

E. Permitting substantial changes in the bids of other applicants after those bids had been submitted and were properly considered final.

F. Providing the Mayor with false, misleading and incomplete material about plaintiff's proposal with the intent of negating the Council's decision to enter into a contract with plaintiff.

25. The purported veto by the Mayor was an arbitrary, capricious and illegal act. Plaintiff is informed and believes, and thereon alleges, that the Mayor's purported veto either was unknowingly based upon false information provided to him as part of the conspiracy alleged above, or was an action taken by the Mayor as an active and knowing participant in said conspiracy.

26. Since the Mayor's purported veto, defendants have at all times refused to permit Nor-West to operate a cable television system within Saint Paul, and have instead entered into an agreement with defendant in intervention, Continental Cablevision, whereby Continental will provide the only such system within the Saint Paul city limits. Defendants refuse to enter into any agreement with plaintiff, even on the same terms and condition as they did with Continental. Plaintiff, moreover, is informed and believes, and thereon alleges, that the City refuses to permit Nor-West to operate within its boundaries in part to punish Nor-West for having initiated the instant action

27. The proposal submitted by Continental fell short of the minimum requirements of the RFP. The City has thus arbitrarily failed to comply with its own criteria as set forth in said RFP.

28. All of the acts alleged above have been taken under color of law.

29. If Nor-West's full compliance with each and every stated requirement of the RFP documents, and its submission of the superior proposal, did not entitle it to a

non-exclusive franchise at the conclusion of the RFP process, then that process itself must be so inherently subjective and standardless as to violate the United States Constitution and statutes.

FIRST CLAIM FOR RELIEF

(Civil Rights – Due Process)

30. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 29 above, and further alleges as follows.

31. Nor-West participated in the City's RFP process in the belief that it would be conducted fairly and in accordance with publicly stated rules and procedures.

32. When the City Council voted to enter into a contract with Nor-West, plaintiff acquired a property interest in the receipt of the contract.

33. In addition to the property right acquired by virtue of the council's July 5, 1983 resolution, Nor-West has a personal liberty interest, as a First Amendment speaker, in the fair and impartial award of a franchise according to fixed and neutral criteria established by the City.

34. Plaintiff has been deprived of these protected interests without due process of law as a result of the arbitrary and improper actions alleged above. Plaintiff is informed and believes, and thereon alleges, that this denial of due process of law was, and is, an intended and purposeful effect of the conspiracy among defendants, their agents and others as yet unknown.

35. The denial of plaintiff's right to due process of law has proximately caused plaintiff injury in amounts which are as yet unknown, but which will be set forth in full when ascertained.

36. The denial of plaintiff's right to due process of law is also causing plaintiff irreparable harm for which there is no adequate legal or administrative remedy, and which will continue unless plaintiff receives injunctive and declaratory relief as set forth below.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

SECOND CLAIM FOR RELIEF

(Civil Rights – Equal Protection)

37. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 36 above and further alleges as follows.

38. Plaintiff and Continental Cablevision are both members of the class of persons known as cable television operators. For all relevant purposes, plaintiff and Continental Cablevision are similarly situated members of that class.

39. The City has improperly discriminated between plaintiff and Continental Cablevision, in that the City has provided Continental Cablevision with a franchise to provide cable television services on certain terms and conditions, but has refused, and continues to refuse, to provide a similar franchise to plaintiff, despite requests from plaintiff that it do so. In addition, the City has specifically stated that it intends to discriminate against Nor-West

and to treat it differently than other potential cable operators in order to punish Nor-West for filing the instant action. Plaintiff is informed and believes, and thereon alleges, that said discrimination is a part of – and resulted from – the above-alleged conspiracy with Kalba-Bowen and others.

40. The City's refusal to permit Nor-West to operate a cable television system, and thereby to disseminate, on the same terms and conditions as Continental Cablevision constitutes an arbitrary and discriminatory classification which denies plaintiff equal protection under the law, and which restricts plaintiff's fundamental right to free speech.

41. By refusing to allow Nor-West to disseminate on the same terms and conditions as Continental Cablevision, the City has caused plaintiff irreparable harm for which there is no adequate legal or administrative remedy, and which will continue unless plaintiff receives injunctive and declaratory relief as set forth below.

42. As a direct and proximate result of the City's refusal to permit Nor-West to disseminate on the same terms and conditions a Continental Cablevision, plaintiff has been damaged in substantial amounts as yet undetermined, but which will be set forth in full when ascertained.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

THIRD CLAIM FOR RELIEF

(Civil Rights – Conspiracy)

43. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 42 above, and further alleges as follows.

44. As alleged above, certain representatives of the City, including the city communications officer, acting in conspiracy with Kalba-Bowen and others, devised a scheme and plan, the object and result of which has been to deny Nor-West the opportunity to operate a cable television system within Saint Paul.

45. By denying Nor-West the opportunity to operate a cable television system as a result of pre-conceived biases and arbitrary and illegal actions, defendants have conspired to and have denied plaintiff rights guaranteed to it under the First and Fourteenth Amendments to the United States Constitution.

46. These violations of plaintiff's rights have caused plaintiff irreparable harm for which there is no adequate legal or administrative remedy, and which will continue unless plaintiff receives injunctive and declaratory relief as set forth below.

47. As a direct and proximate result of the violations alleged above, plaintiff has been damaged in amounts as yet undetermined, but which will be set forth in full when ascertained.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

FOURTH CLAIM FOR RELIEF
(Civil Rights – First Amendment)

48. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 47 above and further alleges as follows.

49. The business of plaintiff cable television company, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available dissemination space (electronic capacity) to reprint (or retransmit) the programming of others, while at the same time providing original content of their own over a portion of the remaining capacity.

50. A cable television company is not a public utility, but rather is a recognized member of the media and a First Amendment speaker. A cable television company does not impose as heavy a burden on public facilities, including the public rights-of-way, as that imposed by other First Amendment speakers, such as newspapers, magazines, theatres, and the like. This is because a cable television company transmits its electronic signals through coaxial cables placed on or in pre-existing public utility facilities. Use of the public utility facilities by one or more cable television companies does not appreciably increase the burden on public rights-of-way caused by those public utility facilities.

51. Defendants' decision, as alleged above, to restrict to *one* the number of cable companies which would be allowed to disseminate in Saint Paul was and is a prior restraint on the exercise of the First Amendment

rights of Nor-West. Defendants have used the RFP process to limit the exercise of speech via cable television to one "governmentally-sanctioned" speaker

52. There exists no compelling governmental interest for imposing this artificial limit on the number of cable companies disseminating in Saint Paul. Defendants imposed this restraint without regard to any alternative means of obtaining cable services which would have been less restrictive of the rights of cable operators as First Amendment speakers.

53. Defendants have further illegally conditioned the right to disseminate via cable through its criteria for evaluating the proposals received in response to the RFP. These criteria, which are also unrelated to any compelling governmental interest, include but are not limited to the following:

A. The company's willingness to allow municipal approval of the content and quality of the programming to be carried by that company;

B. The company's willingness to surrender cash, goods, and services in kind, to the City or to City-designated organizations;

C. The company's willingness to submit to municipal control of its day-to-day business operations; and

D. The company's willingness to waive various rights, including the right to sue the City for violations of law resulting from the RFP process.

54. Plaintiff is informed and believes, and thereon alleges, that the City does not impose such an artificial

and restrictive limitation upon the number of businesses allowed to operate within the City limits on any other non-utility type of business, even those not engaged in First Amendment activity.

55. Plaintiff is informed and believes, and thereon alleges, that some or all of the acts alleged above were committed in furtherance of a past and continuing conspiracy by defendants, acting in concert with other co-conspirators, and with the specific intent of depriving plaintiff of its First and Fourteenth Amendment rights.

56. Each act taken by the defendants has been taken under color of governmental authority and right, and pursuant to an official policy or custom of such authority.

57. The conspiracy and actions of defendants, as alleged above, presently deprive and imminently threaten further to deprive plaintiff of rights guaranteed by the First and Fourteenth Amendments.

58. Plaintiff has no adequate legal, administrative or other remedy by which to prevent or minimize the continuing irreparable harm to its constitutional rights. Unless defendants are enjoined from committing the above-described violations of plaintiff's rights guaranteed by the First and Fourteenth Amendments to the Constitution, plaintiff will continue to suffer great and irreparable harm.

59. As a direct and proximate result of defendants' actions as described above, plaintiff has been damaged in substantial amounts as yet undetermined but which will be set forth when ascertained.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

FIFTH CLAIM FOR RELIEF

(Sherman Act, Section 2)

60. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 59 above, and further alleges as follows.

61. This claim arises under Section 2 of the Sherman Act (15 U.S.C. Section 2) and is brought pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. Sections 15 and 26). The Court has jurisdiction over this claim pursuant to 28 U.S.C. Section 1337.

62. The provision of cable television service involves the conduct of business in interstate commerce.

63. The relevant product market here involved is the provision of news, information and entertainment to the subscriber's television set by means of cable. This product market is part of the larger trade and commerce of ideas represented by the multiple forms of media. The relevant geographic market here involved is the geographic area within the corporate limits of the City of Saint Paul, Minnesota.

64. Plaintiff is informed and believes, and thereon alleges, that some or all of the acts of defendants, as herein before alleged, were beyond the scope of authority granted to the City of Saint Paul by the laws of the State of Minnesota, and were taken in concert with private parties as part of an illegal scheme and plan to exclude

Nor-West from the relevant market and to provide Continental Cablevision with a guaranteed monopoly in the market.

65. Defendant City, in conspiracy with Kalba-Bowen and others, has used, and continues to use, a claimed right to exclude cable television companies from public rights-of-way, and thus, from the market, and has denied plaintiff other legal rights, so as to consciously acquire, maintain, and exert monopoly power over the cable television industry in the City for the purpose of excluding competition, allocating market territories, controlling services and fixing prices.

66. Beginning at some time unknown to plaintiff, defendants have, with specific intent and with a dangerous probability of success, engaged in the acts hereinabove described which amount to monopolization of, attempts to monopolize, and conspiracy to monopolize the cable television market within the City limits of Saint Paul. Defendants now possess monopoly power, and have consciously maintained and extended it. Defendants have used this control over the marketplace to gain improper economic benefits for themselves and for others.

67. The above-mentioned violations of the antitrust laws have directly and proximately caused damage to plaintiff in its business and property in substantial amounts which are as yet unknown, and which will be set forth in full when ascertained.

68. The above-mentioned violations of the antitrust laws have also caused, and will continue to cause, irreparable injury to plaintiff. Unless defendants are enjoined

from engaging in said anticompetitive actions, plaintiff will continue to suffer great and irreparable harm.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

SIXTH CLAIM FOR RELIEF

(Sherman Act, Section 1)

69. Plaintiff incorporates herein by reference the allegations of paragraphs 1 through 68 above, and further alleges as follows.

70. This claim for relief arises under Section 1 of the Sherman Act (15 U.S.C. Section 1) and is brought pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. Sections 15 and 26). The Court has jurisdiction over this claim pursuant to 28 U.S.C. Section 1337.

71. Defendants have acted in combination and conspiracy with each other, and with others, including their own officers, officials and agents, to accomplish the wrongful and illegal acts described in this Complaint. Plaintiff is informed and believes, and thereon alleges, that some or all of the actions taken by officials of defendant City were taken for the purposes of personal gain by such officials and in attempts to further their own independent self-interests.

72. Beginning at some time unknown to plaintiff and continuing thereafter, defendants and their co-conspirators have engaged in and attempted to engage in an unlawful contract, combination and conspiracy in unreasonable restraint of interstate trade and commerce, designed to destroy plaintiff's right and opportunity to

operate a cable television system within the City in violation of Section 1 of the Sherman Act (15 U.S.C. Section 1). The contract, combination and conspiracy herein alleged includes a continuing agreement, understanding and concert of action among defendants and co-conspirators, the substantial terms of which have been to attempt to prevent, hinder, and restrain plaintiff's entry into the relevant geographic market through a pattern of threatened and actual anticompetitive acts and statements specifically designed to accomplish the anticompetitive goal.

73. The above-mentioned unreasonable restraints of trade involve efforts to allocate customers and territories among horizontal competitors, and to fix prices. The actions of defendants and their co-conspirators also amount to a concerted refusal to deal. All such acts constitute *per se* violations of the antitrust laws.

74. Plaintiff is informed and believes, and thereon alleges, that unless restrained by this Court, defendants and their co-conspirators will continue to take actions which will unreasonably restrain interstate commerce.

75. The above-mentioned violations of the antitrust laws have directly and proximately caused damage to plaintiff in its business and property in substantial amounts which are as yet unknown, and which will be set forth in full when ascertained.

76. The above-mentioned violations of the antitrust laws have also caused, and will continue to cause, irreparable injury to plaintiff. Unless defendants are enjoined from engaging in said anticompetitive actions, plaintiff will continue to suffer great and irreparable harm.

WHEREFORE, plaintiff prays for relief as follows:

A. For damages as alleged above and in such further amounts as are proved;

B. For the trebling of such damages as appropriate;

C. For a declaration of such of plaintiff's rights as is appropriate in the circumstances;

D. For an order enjoining defendants from unreasonably interfering with plaintiff's right and opportunity to provide cable television services within the City of Saint Paul;

E. For cots of suit, including reasonable attorneys' fees; and

F. For such other and further relief as the Court deems just and proper.

Dated: 3-26-84

/s/ Omer L. Rains RHD
Omer L. Rains
Richard D. Harmon

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DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial as provided for in Rule 38, Federal Rules of Civil Procedure.

Dated: 3-26-84

/s/ Omer L. Rains RHD
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APPENDIX 11
EXCERPTS FROM REPORTER'S TRANSCRIPT
[p. 47] R. STINSKI DIRECT

A. Judy Blanchard.

Q. Is she with the bank?

A. Judy B. Blanchard, she was the commercial banking officer of the First National Bank of St. Paul.

Q. What does this letter do, what is it function – perhaps if it is short you can read it.

A. I will read it, it says this is to certify that I currently have in my possession personal financial statements from all partners of Nor-West Cable Communications partnership, specifically from – and it goes on to list the partners.

THE COURT: Let's not read them, we have had that three times. Read the last paragraph.

THE WITNESS: While I cannot reveal the detail of the statements I can report the total net worth of these individuals is in excess of $76 million, a good portion which is in liquid assets including $10 million in cash.

BY MR. FARROW:

Q. Thank you. Now Mr. Stinski, I'm going to give you a series of exhibits all at once here, the numbers start at 347 and go consecutively – a terrible word – to 358.

THE COURT: They have all been received?

MR. FARROW: As far as I can tell.

BY MR. FARROW:

Q. While they are all addressed, each letter is addressed to

* * *

[p. 63] the lawyers are there and I –

THE COURT: I agree, I think the Jury is entitled, to know, get us through this process as to how we got to where we are today.

(Proceedings had in open Court in the presence of the Jury.)

BY MR. FARROW:

Q. Now at these meetings before the City Council were there documents prepared by your side of the process?

A. Yes, there was.

Q. And other people?

A. Yes, other people also.

Q. And was there a process by which you got copies of theirs and they got copies of yours?

A. In some cases that happened, yes.

Q. Now this went on for – all the way into June, is that right?

A. This went all the way into the awarding of the franchise and I think that was June 30.

Q. June 30 –

A. Of 1983.

Q. – 1983. What happened on that day?

A. There was a vote by the City Council and the vote was the award of the – they awarded the franchise to Nor-West Communications Cable partnership.

[p. 64] Q. That was a vote of how much?

A. A vote of four to three.

Q. Now as of that time, as of that time I understood that you had spent a little over or some certain sums of money with Mr. Bertman. Did you spend the sums of money?

A. Yes, we did.

Q. Do you have a notation as to how much you spent on the process as of that time?

A. The total amount spent?

Q. Yes.

A. $649,223.97 up to July 13, 1983.

THE COURT: I am sorry, July 18?

THE WITNESS: July 13, 1983. I believe that is the date of the Mayor's veto, that is why this –

BY MR. FARROW:

Q. That was going to be the next question. What happened next?

A. I am sorry?

Q. What happened next?

A. Well, I think that we met before the Mayor's veto and we had to get confirmation of our franchise which was either the 5th or 6th of July, and I think the Mayor had five days or some time in which to either veto it or accept it and he vetoed it within that period of time.

Q. All right.

* * *

[p. 254] H. CUSHING DIRECT

During the course of the trial and during the course of Mr. Stinski's testimony also there were references to proceedings that were had before the Minnesota Cable Communications Board and also the Minnesota Supreme Court.

During the trial there no doubt will be further references to those proceedings. I instruct you that neither the Cable Board, Minnesota Cable Communications Board, nor the Supreme Court, had before them, nor did those bodies resolve, the constitutional issues that are before us in this case. Therefore the rulings that were made by either of these bodies do not control our deliberations and I point that out to you just in case you are wondering the effect of the testimony with reference to those other proceedings and, we will perhaps hear more about that before the trial is completed.

All right, Mr. Farrow?

MR. FARROW: We call Mr. Harry Cushing.

HARRY P. CUSHING,

called as a witness, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FARROW:

Q. Mr. Cushing, could you give us your address please?

A. My home address is 730 Northwest 79th Avenue, Unit C-3, Tamarak, Florida; 33321.

Q. And your occupation, Mr. Cushing?

* * *

[p. 702] H. ROITENBERG DIRECT

a challenged matter, in approximately July of 1984.

A. Correct.

Q. Do you recall what led you to do that, that is to withdraw from the partnership at that time?

A. Well, I think it was two or three months earlier that I had just had enough of the cable TV, they had the ups and downs and heart breaks and I just had enough of it. I didn't want any part of its anymore.

Q. Did the situation with regard to the process in St. Paul that had developed starting in early 1983 play any part in this decision?

A. Well, certainly it had – it had – it was part of the reasons.

Q. Now at the time would you have remained a partner in Nor-West if Nor-West had been allowed to compete with Continental?

MR. REVEAL: Objection, speculation.

THE COURT: Objection sustained.

BY MR. HASKVITZ:

Q. Let me see if I can develop that in this regard.

Do you recall an attempt in the latter part of 1983, perhaps August-September-October, where you were involved in some contact with the utility companies?

A. I, myself, was not in contact with them but some representatives of our company had gone to Northwestern Bell

[p. 703] H. ROITENBERG CROSS

and to Northern States Power, I am not sure if they were both involved, to try to get permission to put our lines on their poles which would indicate, yeah, we were seriously considering it.

Q. At that time the utility companies had agreed you were prepared to compete –

A. Yes.

Q. – with Continental?

A. Yes.

Q. And that subsequently you were still a partner as you said in the summer of 1983 when Mr. Farrow wrote to the city?

A. Yes.

Q. So I gather you were prepared at least at that time also

A. Yes.

Q. – to compete with Continental?

A. Right.

MR. HASKVITZ: I think that is all I have.

THE COURT: All right, cross examination of Mr. Roitenberg?

CROSS EXAMINATION

BY MR. REVEAL:

Q. Good morning, Mr. Roitenberg. Let me begin by covering just some general background questions with you if I might. You originally were simply a general partner in Nor-West, correct?

* * *

[p. 854] WHEREUPON, the following proceedings were had:

(The following proceedings had in open Court outside the presence of the Jury.)

THE COURT: Good morning. Do I understand the plan is to interrupt Mr. White and go with Mr. Lee?

MR. FARROW: Yes, Your Honor.

THE COURT: All right. Now I have a couple of little preliminaries for you. As I see it, over the weekend I took care of two grandchildren and also read an outline of testimony by William E. Lee. I read the briefs that were submitted for and against the motion in limine with reference to the testimony of William E. Lee and I perused and, indeed more than perused, I won't tell you I

read, but I surely went through and became acquainted with, familiar with the deposition testimony of William Lee consisting of 172 pages, albeit I didn't read line for line, but I did go through it.

My understanding is that one of the defenses of the City of St. Paul is that cable television is a natural monopoly in the City of St. Paul, is that true, is that the claim?

MS. McKINSEY: That is correct, Your Honor.

THE COURT: After I read the materials to which I made reference and also reviewed the second draft of our special verdict form I tried to devine as best I am able what [p. 855] portions of Dr. Lee's testimony relate to the fact issues that we are going to give to the Jury; what testimony relates to the legal issues that the Court is going to resolve after the Jury decides its fact issues; and what testimony relates to neither. It is not an exact science, either his expertise nor mine, but I have done the best I can to try to figure out generally from the outline of testimony and also from the deposition whether or not any of it should go to the Jury and whether or not any of it should go to me and I am – I have concluded that portions of Dr. Lee's testimony is appropriate for Jury consideration and I will hear all of the balance of it whether it is appropriate or not in the sense that I will let him testify, I say I will let him, I won't let him testify to anything he wants to testify about, but I think the better rule for me would be to be liberal, if you will, if that is the right word, in the presentation of Dr. Lee's testimony to the extent I am hearing it as a Court rather than a Jury.

Now having said that there is nobody in here, you are all welcome to be here, I don't want anybody connected with the Jury in here at this time. Am I correct in assuming all of these folks are affiliated with one side or the other and nobody is connected with the Jury?

MR. FARROW: That is correct. Dr. Lee is the fellow on the aisle and Mr. Stinski and Mr. Keefer.

THE COURT: Sometimes we get Jurors' relatives and [p. 856] that sort of thing and that is what I am concerned about.

All right, now it seems to me that if you look at the outline, Roman Numeral I, cable being a medium for journalism, it seems to me that relates, or could arguably relate to the question of whether or not cable television is or is not a natural monopoly. Essentially the rest of his testimony, it seems to me, relates to the Court's determination of whether or not the restrictions of an RFP process impinge First Amendment rights and also whether or not the city's asserted defenses or reasons, if you will, do or do not constitute appropriate justification.

And the last item, Item 4 it seems to me in some areas Dr. Lee becomes judge in the sense that he decides in his opinion whether or not the RFP violates First Amendment and I guess that is why I am supposed to be here. So, I am going to let you start with him, Mr. Farrow, and go through – I don't know how you intend to approach his presentation, but certainly it seems to me he should be permitted to tell how cable TV works and what the relationship is between the operating company and the satellite company, the matter that in his view running of a cable system involves editorial choices, what channels

you are going to use, how you are going to divide up the time; and indeed if he wants to compare that to a newspaper or a magazine, so be it.

But from the standpoint of whether or not the [p. 857] ordinance controls the cable market to harm cable journalism I am not going to let him tell the Jury that because I am not going to let – have the Jury decide that. So I don't know how you are going to present what you are going to present but that is what I am going to rule.

Now you tell me how you can get his testimony within that framework.

MR FARROW: Well, of course, I have prepared the testimony as if we were going to give the whole thing to the Jury; but as I listen to the Court's ruling it seems to me that a good part of what we have prepared today to deal with is the ways in which the city sought to establish control of the medium and we did it for the purpose of demonstrating that that was the real purpose, not the stated purpose; in other words a stated purpose limiting access to the market as being aesthetics or disruption or natural monopoly or whatever, of course we think are pretextural but if you analyze the effects of the processes by the documents, that he could commen on to demonstrate that the mode by which that affects editorial freedom, you have an overwhelming result in the end when you look at all of that, you have an overwhelming result that the purposes of cities in general, and the specific purpose of St. Paul, was to control the medium, control it not only from the standpoint of getting benefits it was not entitled to get, but to control it from the standpoint of preventing criticism

* * *

[p. 861] say after the Jury makes a decision it is against the First Amendment principle the Court then has the obligation to review the evidence anew to see whether or not that the Court – see whether or not it has a different view of the evidence. This is an extraordinary situation but I think it comes about because of the fact that freedom of the press is considered to be so fundamental that you can't risk it.

THE COURT: Now, based upon what I have said I will let you do, I am willing to take his testimony by the Court after you have given the testimony I am going to permit to the Jury, as long as he is here, I am content to hear it. If you want to call him back for more with the Jury at some other date I will excuse the Jury and I will just hear his testimony.

MR. FARROW: It may be the way to go, Your Honor. I will try to – I will try as I go through it to obey the Court's strictures about what I am to cover with the Jury here. If I step over why it will be unintentional, I am sure that I will get objections from there and perhaps I should invite them at this time from the Court because the Court has a better feeling itself for where it wants to stop. I will try to stop and try not to go further but afterward I think while he is here I think if the Court is willing, I would appreciate the opportunity of going through all of the rest of the material I prepared.

[p. 862] THE COURT: I would be pleased to do that. I think that is the way to do it.

Let's hear from the defendants.

MR. FARROW: One last thing, would I still have the option to bring him back if I want to?

THE COURT: Yes, if you want to make, as a part of your rebuttal, additional offers with reference to his expertise in response to the city's claim; or if you want to then say Judge in his presentation to the Court he said A, B, C, D and now I want the Jury to hear that as rebuttal, you can either bring him back or you can ask me to have the deposition read, either way, I don't care, assuming that I feel at that point in time that it is properly for the Jury.

MR. FARROW: I don't see how you could be more fair in the process.

THE COURT: All right. You are Ms. McKinsey?

MS. McKINSEY: Yes, Your Honor. Basically we have no argument with the Court's ruling. We have taken the position that the vast majority of Mr. Lee's testimony is irrelevant to the issues in the case, that was the premise of our motion in limine. In addition a good deal of it also relates to the legal issues that the Court will decide. With regard to the background of the Cable Communications Board and that sort of testimony, we have no objection to that being submitted to the Jury. Our only objection would be that it is essentially

* * *

[p. 869] case I mean we have all been thinking about special verdict and to me how you try the case is embodied in the special verdict form, so I may well – the way it is put together now is essentially the way we have been talking about it for the last two or three weeks, I may give

you a draft here by the end of the week or starting next week and then you can comment on it.

MR. REVEAL: We would like to have that opportunity.

THE COURT: Yeah. Okay, Dr. Lee has been present and you have heard our dialogue here and you have gone through this twice before as I understand Dr. Lee before my friend Judge Wright and before a Judge out in California named Schwartz (ph.), is that his name, and they let you testify I guess essentially the way you did in your deposition. I am going to maybe be doing that, but only part with the Jury and part with me. Mr. Farrow will try to frame his questions consistent with our dialogue here this morning and I guess that essentially means that I don't want you telling the jury that a cable television operator has a First Amendment right because RFP's control journalism, I may let you tell that to me, but I will not let you tell that to the Jury. We are going to call your expertise in how systems operate, how in your view they make editorial judgments, the programming, the satellite thing, and essentially I guess what is Number 1 on your analysis of cable being a medium for journalism; and what

* * *

[p. 930] W. LEE DIRECT

A. Yes, they are.

Q. Are some operated pursuant to permits?

A. Yes.

Q. Some pursuant to licenses?

A. Yes.

Q. As an example, as an example of the permit process are you familar with the field of news racks?

A. Yes.

Q. All right. Are those typically located on public facilities pursuant to contract or permits?

MS McKINSEY: Objection, Your Honor, beyond the scope, calls for a legal conclusion

THE COURT: Objection sustained.

BY MR. FARROW:

Q. With respect to cable television systems, and I will direct your attention to Guam, are you familiar with that situation?

A. Yes.

Q. Does that company operate pursuant to a contractual franchise or a permit?

MS. McKINSEY: Objection, relevance.

THE COURT: Objection overruled, you may answer.

THE WITNESS: Guam cable television which is located on United States territory of Guam operates according to a business license which they have renewed every year. They do

* * *

not have the type of franchise agreement that Continental has with the City of St. Paul.

BY MR. FARROW:

Q. With respect to that particular system in Guam have you had occasion to discover whether or not it does anything in the way of news reporting?

A. Yes, they do.

MS. McKINSEY: Objection, Your Honor, again relevance.

THE COURT: Objection sustained and the answer will be stricken.

MR. FARROW: Excuse me just a moment, Your Honor.

THE COURT: Surely.

MR. FARROW: I guess from this point on it is another field, Your Honor, and the break place, so we would –

THE COURT: Thank you, counsel. Now we will have the cross examination of Dr. Lee with reference to his direct testimony in front of the Jury.

CROSS EXAMINATION

BY MS. McKINSEY:

Q. Good morning, Mr. Lee.

A. Good morning.

Q. Professor Lee, you are not an attorney, is that correct?

A. Correct.

Q. And in fact you have taken no courses in a school of law,

* * *

[p. 1764] T. HAZLETT DIRECT

quite that way or in any way.

MR. BRAMSON: I am telling you that we were concerned about waiving our first line position when we submitted proposed instructions and Jury verdict.

THE COURT: You never waive anything in this Court, I want people smarter than me to review this.

MR. BRAMSON: Transcribe that part.

THE COURT: Really I want you to keep whatever, keep any positions you have. I am not trying to bury anybody's positions, I am trying to understand them.

MR. BRAMSON: I think it is an invited error if one submits a Jury instruction without clarifying that it is not the first line.

THE COURT: Okay. Where does that leave me trying to prepare a verdict form I guess is where it leaves me.

MR. REVEAL: The second part of the thought here though is if there is only one, going to be only one, then there is no reason why the city should have to undergo the disruption of multiple cable television systems.

THE COURT: You want a question for the Jury would only one cable company survive?

MR. REVEAL: Yes.

THE COURT: Do you want a question would a franchise or a single system still feel what would otherwise – that is not the word I am going to use – but is there what you call a

* * *

[p. 2002] defendant.

THE COURT: It is called nunc pro tunc. Okay, anything else you want to do?

MR. FARROW: Yeah, we were going to ask that the testimony of Dr. Lee which was taken out of the presence of the Jury be given to the Jury. I should note that now that it is in the Court will recall I believe that the great bulk of that testimony was handled outside the presence of the Jury and dealt with the specific processes used by the City of St. Paul in connection with his franchising process.

THE COURT: I am sorry?

MR. FARROW: For example Dr. Lee was asked this: Document after document was used in the RFP process, whether that particular document would have a tendency to inhibit editorial judgment, so we think that all of his testimony should go to the Jury if the issue is going to be going to the Jury at all and I think they are entitled to hear the whole of the testimony. I say that at a time when I know that as of this time the Court really

hasn't made up its mind about what issues are going to the Jury.

THE COURT: I don't think anybody made up their mind, you are talking about the Court making up its mind, the walls told me one day that the defendant was thinking of – plaintiff was thinking about waiving a Jury.

MR. FARROW: We have certainly put that matter [p. 2003] through our mind, yes, Your Honor, and we are still considering that a possibility.

THE COURT: If you are considering it and if at the end of this case you are trying to figure out what direction I am flipping, I am not flipping any direction. Somebody is going to pay for that Jury, I am not going to have 10 people here for three weeks and then all of a sudden have one party tell me by the way, Judge, we don't want them anymore.

MR. FARROW: I understand the Court's feeling there and certainly it is reasonable to do that and we certainly haven't made a decision.

THE COURT: What is the problem?

MR. FARROW: I will tell you what the problem is, the question comes up about what is the thing that should go to the Jury and in our view we believe, and we know we are at the end of our case now, but we believe that the only issue that could go to the Jury and this Jury could really get is the question of damages. We believe there is no answer to the First Amendment position for the plaintiffs.

THE COURT: Why do you want a Jury?

MR. FARROW: To set damages and I will tell you another thing, Your Honor –

THE COURT: I will tell you, I will tell you why –

MR. FARROW: We just got through with Sacramento and I have been to Jefferson City, Missouri and I have never been [p. 2004] here before.

THE COURT: How did you get along with Judge Wright?

MR. FARROW: I don't think I ever want to go back to Missouri again and I am not going to try a case before Judge Wright again, there aren't enough big cases for it.

THE COURT: I beg your pardon?

MR. FARROW: There isn't a case big enough for me to want to go back in front of Judge Wright.

THE COURT: My sense is you want a Jury because you are entitled to it and you also want a Jury because you have a Judge who dismissed your case entirely and got reversed in the Court of Appeals and you don't know anything about the judge and you don't know how he is going to flip or flop, and I don't fault you for that, that is fine.

MR. FARROW: That is lawyer problems.

THE COURT: That is the way the world works, I don't fault you for that for a minute. But, don't come in here after you watch the Judge work for six weeks and say by God, he ain't too bad and maybe he is leaning our way, we will waive a Jury.

I thought that I wouldn't say it out loud, that is like not wanting to use the alternate jurors, you want to eyeball them, see how they look, that really gripes me to tell you the truth.

MR. FARROW: I think that is my job.

[p. 2005] THE COURT: You may think that is your job but I have a job too and when you have four people sitting here and then tell them to go home at the end of the case, I think that is cruel.

MR. FARROW: Eight out of ten or nine out of ten it is a different ballgame, but if it has to be universal then I am increasing my problems.

THE COURT: I have plaintiffs' lawyers who begged me to give them 12 Jurors, but that is your problem, it is also my problem when it comes to these Jurors. Okay, I don't know where all that takes us.

MR. FARROW: I think it takes us to the question of Dr. Lee.

THE COURT: Your view is that?

MR. REVEAL: We don't believe that Mr. Lee was competent to testify on any of the subjects and certainly none of the subjects that the Jury was going to be asked about and so for all the reasons that prompted the motion in limine to begin with we certainly don't believe his testimony to be read to the Jury, that portion of it that was before the Court.

THE COURT: I am going to deny the motion to read at this time with leave to renew at the close of the case.

MR. FARROW: Okay. We have a couple of more minutes?

THE COURT: I have until 12:30, what are we going to do with the Jury?

[p. 2029] about, each of which has been admitted by the defendant city in its answer to the complaint.

Paragraph 11 in the amended complaint reads: That in late 1979 the City of St. Paul issued a Request for Proposals, that you have heard referenced to as an RFP, designed to elicit responses from various prospective cable television operators thus permitting the city to choose whichever one it liked the most.

Paragraph 12 reads in response to this RFP at least seven different cable companies expressed a desire to operate cable television systems within St. Paul. On May 4, 1981, the city decided that it would exclude all cable companies and operate its own system, thus none of the seven were at that time permitted to operate cable companies within the city limits of the City of St. Paul.

On or about April 27, 1982, the City of St. Paul reversed its position and abandoned the idea of municipal ownership of a cable television system. Those are the allegations that were admitted in the answer and, finally, it is alleged in another paragraph in the complaint that the plaintiff and Continental Cablevision are both members of a class of persons known as cable television operators and for purposes of the case it is alleged that the plaintiff and the cable – plaintiff and Continental Cablevision are similarly situated members of that class

and that allegation in the [p. 2030] complaint was admitted in the answer.

Mr. Farrow, my understanding is that concludes the plaintiff's proof?

MR. FARROW: Yes, plaintiff rests.

THE COURT: Testimony for the plaintiff in its case in chief is concluded. Mr. Reveal for the defendant?

MR. REVEAL: Your Honor, as its first witness the city would call Mayor George Latimer to the stand.

GEORGE LATIMER,

called as a witness, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. REVEAL:

Q. Mr. Mayor, would you please state your full name and current address?

A. I am George Latimer, I live at 754 Linwood Avenue in St. Paul.

Q. And at the risk of asking the obvious, are you currently employed?

A. I am. I am the Mayor, of St. Paul.

Q. For how long have you held that position?

A. June 12 of 1976.

Q. And since June of 1976 how many times have you stood for reelection?

A. Five times since then.

* * *

[p. 2055] G. LATIMER DIRECT

process or a Request for Proposals, and in effect you say to the world we are interested in examining feasibility in this area, cable television, and we are requesting proposals from you and whatever that universe might be. In this case it was cable television, it might be laying sewers or a variety of other things, but you say we are requesting you to come forward and propose to us what you would do relative to bringing cable, and understood that, the city council received seven responses to that invitation.

Q. Do you have any understanding or recollection as to whether or not any one of those seven applicants were accepted?

A. They were not accepted at that time.

Q. What happened next?

A. It seems to me that the council thereafter determined that we ought to explore some form of municipal ownership and there was discussion along those lines somewhere around '81-'82 I know it led to a vote on municipal ownership to the spring of 1982 and I think – well, I think at that time there were municipal elections at the same time.

Q. When you say you vote, do you recall that there was a city wide referendum conducted on that subject?

A. That is correct.

Q. Do you have any understanding as to why that matter was put to the voters?

* * *

[p. 2140] G. LATIMER CROSS

studies done commissioned by the city, were there not?

A. I said before that there may have been which I was not aware of, but that I personally do not recall any such studies.

Q. I want to point your attention to Plaintiff's Exhibit Number 5 in evidence. Would you give us the title of that, Mr. Mayor?

A. The title is Report and Recommendations Citizens Advisory Committee on Cable Communications, November 15, 1979.

Q. All right. Were you aware of the existence of this Citizen's Advisory Commission, Mr. Mayor?

A. Yes.

Q. Did you, as a matter of fact, help appoint some of these people?

A. I think I did, yes.

Q. And they studied the subject matter of cable television for some period of time, did they not?

A. Yes, they did.

Q. And produced a report which was submitted to you and to the city, to the council?

A. That is correct.

Q. All right.

A. I think so.

Q. And that is at least a portion of that report there in your hands, right?

[p. 2141] A. It appears to be, yes.

Q. Yeah. Without making you take the time to read it right now, are you generally familiar with it? Have you looked at it before now?

A. I don't recall seeing it before.

Q. Could it be you have just forgotten it?

A. Of course, very possible I could have forgotten it.

Q. I would assume that if you had these citizens out studying the subject and if you were handed a report you would have looked at the report?

A. Typically I would. You asked me if I recognized the report and my answer is I do not.

Q. All right. You did see it when it came in?

A. I should have, but typically there would be markings on it that would have indicated whether it came through my office or to me, but I have to believe a report like this should have come to my office and from my office it would be reviewed by a staff person and sent on to me, typically that is the way we operate. However, I simply don't remember reading this. I might have.

Q. At any rate do you recall that such investigation was done on the cable television industry on behalf of the City of St. Paul; an investigation as to what evidence the City of St. Paul could get out of it?

A. Yes, sir. I recall before the formation of the Committee, [p. 2142] I recall the committee recommending to the council that their – it was now feasible and reasonable to proceed and from that recommendation flowed the City Council actions toward franchising. That is the part I remembered about this, but I don't really – do not remember much about the content of it.

Q. Well, it was kind of a process where various elements of the city structure, the municipal structure, were asked in what way could you use cable television, is that right?

A. Yes, I do remember there were task forces set up including city employees. Now I remember it because you mentioned it to me, in which they examined different parts of it, yes.

Q. Surely. So we had various department saying assuming we get cable at no cost, what can you do with it, right?

A. I don't know about the assuming cost but the broad outline of your question is did we have a task force of employees and citizens examining the benefits that would flow from cable and the answer is yes.

Q. Well, when you sought the creation of this task force you went really all through the fabric of the city to the hospitals, the neighborhood groups and in each case it was give us a list of what you want out of cable?

A. Right.

Q. Is that a fair characterization?

A. That may well have been true. I don't say I remember doing all of that but –

* * *

[p. 2170] J. SCHEIBEL DIRECT

Q. All right. And for how long did you do that?

A. I think the campaign lasted about six months until he dropped out.

Q. And what did you do then?

A. Then I organized a consumer health group in North Minneapolis. Then I worked as an organizer on the east side of St. Paul. Then Joann Showalter was elected to the City Council, I served as her aid for a year.

Q. Which year would that have been?

A. I believe that was 1978.

Q. All right. In your capacity as an aid, what kind of things were you concerned with or, otherwise stated, what role did you play?

A. I did some of her constituent work, I advised her on different policy matters, she chaired the energy, utility and environment committee at that time, so I provided staff assistance for that committee work, did speech writing for her, handled phone calls.

Q. All right. And when you left that position what did you do next?

A. That is when I went to Washington, D.C. to be Deputy Director of VISTA.

Q. What is VISTA?

A. It is Volunteers In Service To America.

Q. And what were your responsibilities in that capacity?

* * *

[p. 2173] Twin Cities' Marathon, St. Paul Port Authority, a number of other groups and local boards.

Q. Okay. Are there any other community organizations or civic organizations which you are particularly active in other than the ones you have already identified?

A. I think the ones I have named I am probably most active in.

Q. All right. Backing up to the period of time that you were acting as an aid to Councilwoman Showalter, I think you told us that was in 1978?

A. Yes.

Q. Did you at the time have any contact with the subject matter of cable television in the City of St. Paul?

A. Yes, I did.

Q. Would you please describe that for us?

A. As she began her term there were two issues of key importance I related to her committee, one was the subject of mandatory trash collection, the other issues she became involved in that related to her committee was the

area – was cable television. It was during my time working with her in the committee that she decided that a citizen's task force should again be set up to explore cable television in the City of St. Paul.

Q. Would you have been the staff person principally responsible for that activity?

* * *

[p. 2418] J. SCHEIBEL CROSS

during the year, of the status of the suit, what the different claims were, and I was aware that that was one of the requests of Nor-West that continued to be an ongoing request.

Q. And as far as you know that request, and that request continued on to today?

A. That is correct.

Q. Now if I can, Your Honor, Mr. Scheibel, I want to take you back to the era of 1979. A I understand it you were aware at that time of cable television and I am not sure, did you tell me that you participated in some way with the advisory committees work about the cable television?

A. I was working at that time for Councilwoman Schowalter, she chaired the Energy, Utilities and Environment Committee. One of the issues she was – that the committee became involved in, she became involved in was cable television. I worked with her during the initial establishment of the committee and it was shortly after the formation of the committee that I left to go to Washington, D.C.

Q. That was a committee that was chaired by Schowalter and had on it Brooks, Tschida, Brittson, Cochrane, Boldstein, Hayes, Kayser, Kennedy, Stantomski (ph.) and Tuscano (ph.)?

A. That is right.

Q. That is Plaintiff's Number 5 in evidence, that is the report and recommendation of that citizen's advisory committee?

[p. 2419] A. Yes.

Q. All right. Now is it – do you need a copy of this, would you like it? I am going to ask you a few things about it.

A. That would be helpful.

Q. I will give you my copy. Although you might have gone away before the report was prepared, you did come back and you did see the report later, did you not?

A. Yes, I did.

Q. Okay, and it is correct, is it not, that what that report is about is a recitation of the various ways that cable television would be of benefit to the City of St. Paul and to its residents, is that right?

A. That is right.

Q. And is there – there is nothing in that study whatsoever about any element of disruption or of ascetic problems or of economic scarcity or anything of that nature?

MR. REVEAL: Objection, Your Honor, the document speaks for itself.

THE COURT: Objection sustained.

BY MR. FARROW:

Q. When you used the document, when you looked at the document after you came back from Washington and were on the City Council, did you decide whether or not there was a need for a new study?

A. We decided there was not a need for a new study.

* * *

[p. 2556] S. ASHLEY CROSS

And down at the bottom I think there is a reference down there to $76 million would you read that out loud for the Jury now?

A The last paragraph reads while I cannot reveal the details of these statements I can report that the total net worth of these individuals is in excess of $76 million, a good portion of which is in liquid assets, including $10 million in cash.

Q Now did Ms. Blanchard have authority to make that statement on behalf of the bank?

A I assume she did.

Q It is on bank stationery?

A That is correct.

Q And with respect to the $10 million in cash that is called liquid assets, right?

MR. REVEAL: I am going to object on the grounds of relevance, relating to the financial statements or condition of any of the partners.

THE COURT: Objection overruled, the answer may stand – I am not sure we got an answer.

MR. FARROW: I don't think we got an answer.

THE COURT: I don't think we did. The objection is overruled.

MR. REVEAL: May I approach the Bench?

THE COURT: You may.

* * *

[p. 3486] A. SHETKA CROSS

proposal from the cable company to cut the streets instead of using the water tunnels?

A I believe the water – I don't know that, but I believe it was an alternate that was being explored to put it in direct, buried in the streets.

Q And that was the subject matter of the meetings you were involved with there?

A Yes.

Q And the outcome of that was that the streets were dug instead of using the water tunnels, is that right?

A Yes.

Q And that was because of the request from City Hall that they wanted to hurry up access of the cable system to City Hall, isn't that correct?

A I don't – I don't know if that was it or not.

Q The same memo, let me draw your attention if I may, were you advised of the meeting here, it is the top of Page 4?

MS. McKINSEY: Excuse me, Your Honor, this exhibit is not in evidence and I will object to any testimony regarding the content of it.

THE COURT: The objection is sustained but he may look at it to decide whether or not it helps refresh his memory. Do you want him to read that Page 4? Why don't you read Page 4 and he will ask you a question.

MR. FARROW: Read whatever you want to.

[p. 3487] THE WITNESS: I have read the top.

BY MR. FARROW:

Q Having read that, the top of that, does that refresh your recollection as to the reason that the streets were cut instead of the water tunnels being used?

A Again this meeting –

MS. McKINSEY: The question should ask for the witness' own knowledge and not anything –

THE COURT: Don't read from the memo, just tell us if that refreshes your memory about who it was that asked they use the streets rather than the water tunnels.

THE WITNESS; I recall that being discussed but I don't know what factors were all considered, why the water tunnels were ruled out. The expeditious installation may well have been one of the reasons, but I am not

positive that was all of the factors that entered into the decision.

BY MR. FARROW:

Q Have you seen that memo before, Mr. Shetka?

A I may have.

MR. FARROW: We would offer that memo in evidence, it is Exhibit 1661.

THE COURT: 61?

(Plaintiff's Exhibit 1661
offered in evidence.)

MS. McKINSEY: Your Honor we would object and if I

* * *

[p. 4270] Mayor's Office and would be in charge of the cable franchising process and reporting to me. Linda Camp would be fully responsible for the entire cable program. The staff team will focus on the application of cable services to improve city services, data and information transfer, library services, sewer system monitoring, police and fire alarms, staff training and the like. As city staff get up to speed they also could play a valuable role in developing St. Paul's entire cable system.

The staff team will have access to cable consultants in addition to Linda's assistance. Direct and indirect expenditures associated with the cable franchising process would be fully reimbursed. The cable companies' application fees and the final franchise award itself provide the necessary revenues.

This work is a priority. City government's greatest gain from cable will be in municipal applications. Our cable bid specifications should be the most demanding in the country. St. Paul should be no less than a national model of utilizing municipal cable applications through the private franchising process. We are all aware of the prevailing budget crunch. That last sentence has, on one it is underlined and on the right hand side of the page are the words "be careful"; on the left-hand side of the page it says for practical applications, security communications, [p. 4271] et cetera. Then it goes on to say potential internal applications are no small part of the solution.

Contingent upon the council's action, Linda or Tom will be contacting team members about an organizational meeting the first week of June. The second week in June a one day work session will be conducted. The individual staff time required is impossible to estimate. The busiest periods will be mid-June to early July when the draft bid specifications are being completed; and in November during bid evaluation.

It is possible, although not likely, that individual staff members could be spending up to one-half time on the effort during critical periods.

Do you want me to keep going to the next page?

BY MR. FARROW:

Q I think that solves the problem now, Ms. Camp.

This is the Mayor's memo written – what was the date of that memo?

A June 1, 1982.

Q Now that memo had been written after the voters of the City of St. Paul had decided not to have a municipal system, isn't that right?

A That is correct.

Q So that memo was written at a time when the city was electing to have cable television and electing to have whatever problems might come with having it, is that right?

* * *

[p. 5360] THE COURT: I am sorry, I am looking at the wrong page. 129 Line 12, all right.

MR. FARROW: To 131 Line 7.

THE COURT: Thank you.

MR. FARROW: Pardon me?

THE COURT: 131 Line 7?

MR. FARROW: Yes.

THE COURT: All right.

MR. FARROW: Okay.

THE COURT: You want me to hear from Ms. McKinsey before I make a judgment about that?

MR. FARROW: Shall we go to another subject, Your Honor?

THE COURT: Please.

MR. FARROW: With respect to Professor Lee, I would like to explain our position with that if I can.

THE COURT: Please do.

MR. FARROW: I made some notes here from the beginning, we have taken the position that the process used by St. Paul is content viewpoint related and for that reason that the applicable test to be applied by the Court in deciding the constitutionality of any deprivation of rights as alleged is that of strict scrutiny. Thus we don't believe that the O'Brien (ph.) test is applicable, even though we don't think that the city could meet that test, that is the test, that [p. 5361] four part test about is in the action within the constitutional power of the particular government, does it further an important or substantial governmental interest, is the governmental interest unrelated to the suppression of free speech or free expression; and is the incidental restriction on speech no greater than is necessary or essential – pardon me – essential to the furtherance of the governmental interests.

We think that is the test that they can't possibly meet; but even the real stronger test is that defendant must demonstrate a compelling government interest and demonstrate that the specific statute in question was closely drawn to accomplish that compelling governmental interest and I think the consolidated Edison case is the one that spells that out very strictly or very succinctly at Page 540.

We think the testimony of Lee both before the Jury and out of the presence of the Jury has demonstrated our position and that this testimony is corroborated by a host of exhibits as well as by oral testimony. But, in addition to being relevant to the question of applicable standards, we believe that Lee's testimony is entirely, in its entirety, is

relevant to issues which as of now we have to assume we may have to argue to the Jury; specifically we believe that Lee's testimony is relevant to rebut the repeated claims by defense witnesses that there has been no censorship of cable. These [p. 5362] questions have been put to the defense – by the defense to witnesses for the city, witnesses for CASP, witnesses for Continental and on a repeated basis uniformally they claim there has been no censorship or no censorship has been exercised or felt, even though as you might recall the executive director of CASP had to admit that he was required, that the organization was required to sign a contract with the city. He gave the city the power to put them out of business on only 30 days notice and without cause or any need for any cause being shown. Clearly the testimony in-camera of Professor Lee should be allowed to rebut this, what is I believe inherently untrustworthy opinion evidence.

Now the Court will recall the number of witnesses, I think Scheibel and Coleman and Gosman and Camp and Latimer, all those questions like that.

Secondly Lee's testimony in-camera should be admissible for an entirely different reason, it is the contention of the plaintiff that the veto of Nor-West can only be explained in realistic political terms in one way: The city elected to have only one operator for all the obvious reasons of securing benefits to both the city and to the elected officials. The benefits that could only be provided by limiting access to the market and then carefully dispensing the city's largess to a selected beneficiary, having made that decision, the only way you can make that work is you have to [p. 5363] be careful who you select. And, it had to be done in a such a way so as the benefits to be

obtained would be preserved, that they are continued, and what that took was at the very least the selection of a cable operator who would be a non-hostile member of the press, so to speak, to use my phrase a tame cable operator.

Now bearing that in mind a franchise made up or a franchise granted to a group made up of 11 financially independent local personalities, some of whom were already active in the community, would be a dangerous franchisee for those making that decision. There might be the possibility of a republican in the crowd or the wrong party, there might be the possibility of somebody in that group of 11 deciding a viewpoint on some issue that would not fit and so that makes sense, that you have to stop and think about what the comparison was on the other hand, compare it to the other and the franchisee based in Boston or New York whose only interest in local affairs is to make sure that he couried enough favor with the local officials to stay in business and get his system renewed and to make whatever profits could be made from a single cable operation, would certainly be – would fit the definition of a tame operator.

And now we think, we think that there is enough evidence in the record right now to support a finding that was the real – that that was the real purpose of the veto, the [p. 5364] real purpose of the limitation of the access to the market, and a real purpose of the selection of Continental and the real purpose for the refusal of a second franchise. This in-camera testimony, Lee's in-camera testimony would be probative of the fact that the process chosen does indicate a desire on the part of those who were voting on behalf of the city to influence at least in a

negative fashion if no other fashion, the content of programming and as such it is relevant to demonstrate that the stated reasons for the veto are not so; the reason for denying the second cable thing are not so; and to use the word of Professor Cribb (ph.) I think is the one who has these phrases, that these reasons given are nothing more than retrospective rationalizations and this is yet another reason why I think Lee's in-camera testimony may be admissible. No one in this case has denied the social and entertainment and educational value of access programming, we have never quarreled with the concept, but just as a newspaper controls its editorial page except letters to the editor, we believe a cable operator should control that access and that once that control is lost as it is with this process, that you have prior restraints, and in this case you get a prior restraint not only on the cable operator but you get a prior restraint on those who are doing the access programming through the control of GASP and or CASP, and their ability to wipe it out in case they don't like what it is doing and their [p. 5365] insisting it be accountable.

It can easily be anticipated in the current state of the record the defense will argue to the Jury that Nor-West opposes access and that is one of the great benefits to be had by the franchising process and if Nor-West should win that would be lost; that access is a wonderful thing, but for your decision in favor of the city it will be gone. I think Lee's testimony demonstrates the significant difference between access selected by the operator and responsive directly to those consumers, and access as handled by this franchising process and the institutionalization of

it as the facts have demonstrated has occurred here in St. Paul.

For all those reasons we believe that the in-camera testimony of Professor Lee should be read to the Jury and I appreciate the timing of the problem, but I don't know, without knowing more on what is going to come with the decisions to be made between now and the time the case is actually submitted to the Jury, I can't make a better decision about how to handle it than this.

THE COURT: All right. Mr. Reveal, do you want to respond to that?

MR. REVEAL: Very briefly, Your Honor. The legal reasons why Professor Lee's testimony should have been taken outside the presence of the Jury were already the subject of the earlier motion in limine that the city filed with respect

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[p. 5367] the presence of the Jury.

THE COURT: All right.

MR. FARROW: It is just – a quick response, Your Honor, if we were offering the testimony as being an appropriate measure of the law of First Amendment, I would be very happy to put Mr. Lee up against Mr. Geller anytime, but of course that is not the purpose of the testimony nor is it the purpose of the offer. Professor Lee is a professor of journalism and the purpose of his testimony, and I think the effect and the net effect of it was to demonstrate as to a journalist the chilling effect of various provisions of the process and various provisions of

the franchise ordinance, the various steps of the whole matter.

What is material and relevant about it is that effect and I believe that he qualifies as an expert to talk about the effect of those things on the business of journalism. Now the business of journalism is the press and that is what we are dealing with.

THE COURT: All right. I will have to review my notes on Lee's testimony in light of what you have just told me and I will do so.

Now Ms. McKinsey is here, we are covering Mayor Latimer's deposition, Ms. McKinsey, and the note that I have indicates that the defendant desires to read Page 11 Line 16 and Page – I am sorry, Page 11 Line 16 to Page 12 Line 24 and

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[p. 5493] Now the three documents with reference to expenditures came in, we have identified those and those have been received, Ms. Ronan is indicating yes.

MR. FARROW: Yes, Your Honor.

THE COURT: I have a document entitled Plaintiff's 441 which was offered yesterday which represents the minutes of the meeting of the City Council of the City of St. Paul June 30, 1983, at which the conduct of the city which gives rise to this case is formalized and discussed and it just seems to me basic that that document should be in the case and I am going to overrule the defendants' objection to it on the grounds of irrelevance and receive Exhibit 441.

(Plaintiff's Exhibit 441
received in evidence.)

MR. REVEAL: Your Honor, I understand the Court is admitting the document but I do not believe that that was a complete statement on the basis of the defendants' objections.

THE COURT: Well, whatever the basis, give me the rest of it if you want to.

MR. REVEAL: The additional objections I believe I noted were Rule 403 and it was cumulative of evidence already in the record.

THE COURT: And the record may note those additional objections which are likewise overruled.

The plaintiff has submitted Exhibit 543, Exhibit 551, [p. 5494] some attachments, 700, and the document that you referred to at the Bench just one moment ago, the number of which escapes me, can you help me, Mr. Bramson?

MR. BRAMSON: 1650, Your Honor.

THE COURT: 1650. All of these, as I understand, are offered as evidence of an agreement, an indemnity agreement between the city and Continental Cable Company and in addition to that the plaintiff has been kind enough to furnish to me a brief regarding the introduction of those documents indicating reference to Rule 411 and the like and the need to point out the adversity between the plaintiffs and Continental vis-a-vis certain of the Continental witnesses and other Continental evidence that comes in. I am satisfied based upon presiding over this trial that the Court has given the plaintiff more than

sufficient leeway to point out from any witness whether it has been expert, employee, or otherwise, the adversity that exists between Continental and the plaintiff and the fact that continental indeed paid fees and disbursements for a number of these experts originally engaged them, and that all that testimony has come in and Hostetter, Mr. Hostetter was clearly cross examined on his views about who should win this case, as the other Continental people, and it is abundantly clear to me, it seems to me, to everybody, that Continental is not rooting for the plaintiff and I don't think that that indemnity information is helpful to resolve the controversy [p. 5495] that exists between the city and Continental Cable Company (sic) and I am going to continue to exclude evidence of indemnity over objection of the plaintiff which would include as I understand it Mr. Farrow 543, 551, 700 and 1650. That is the purpose of these offers?

MR. FARROW: Yes, Your Honor. Your Honor, there is, I have one other document in my list.

THE COURT: I have missed one.

MR. REVEAL: I have an addition, 701.

THE COURT: If that is included within the offer for that same purpose –

MR. REVEAL: Excuse me, I misspoke, I have it in my hand, but it was the document which the Court admitted subject to having the first full paragraph on the second page redacted.

MR. FARROW: That will be done.

MR. REVEAL: Which we have now done?

MR. FARROW: And it is in evidence as I understand.

THE COURT: I show Plaintiff's 701 –

MR. REVEAL: Yes, sir.

THE COURT: I think Ms. Ronan and maybe one of the other folks, I have 701 in except for a paragraph, Page 2 Paragraph 2.

MR. REVEAL: That is correct, Your Honor.

THE COURT: I take it – I make enough mistakes

* * *

[p. 5496] without making it voluntarily, I take it Mr. Reveal you are continuing to object to this indemnification?

MR. REVEAL: That would be a safe assumption.

THE COURT: I want the record to reflect my ruling is made at your insistence.

MR. REVEAL: It was our position before, during and at the conclusion of this case.

THE COURT: All right. The record may indicate that those offers have been made by the plaintiff and continue to be made with reference to evidence of indemnity.

MR. FARROW: Sure. I assume that our brief will travel with the record?

THE COURT: It won't but I would be glad to make both of those briefs, you see I don't docket briefs but on that issue if Mr. Reveal wants to docket his brief and you want to docket your brief I would be pleased to do that so the record is complete.

MR. FARROW: I would like to because that saves trying to make them of record. Those are our reasons.

THE COURT: That is fine. You submitted a brief in connection with your motion in limine?

MR. REVEAL: Yes, Your Honor, and the plaintiff responded to it at that time so if in fact we are going to adopt this procedure we would like to have the opportunity to prepare a brief response.

[p. 5497] THE COURT: No, no, no, no, enough is enough, this is what I had when I made my ruling and if you want to buttress it you buttress it with some brief that comes on different size paper on five because this is what I had when I ruled and that is all I think should be in the record at this time, that is it, and I will file and ask Ms. Frette to docket and maybe you folks should dig out copies of your motion in limine brief, Mr. Farrow's response to your motion in limine brief and the brief Mr. Farrow gave me yesterday with respect to the indemnity evidence.

MR. FARROW: All right, Your Honor, fine, Your Honor, we appreciate it.

THE COURT: Now I have the problem of Mr. Lee and I have gone back and read my notes with references to Mr. Lee and I am of a mind still or even, based

upon that review of my notes that I am not going to read Mr. Lee's testimony taken in-camera, just as I am not going to read Mr. Geller's testimony taken in-camera to the Jury. In my view number one I am not at all satisfied that the kind of things he is talking about where the proper subject of expert testimony and I so find.

More importantly it seems to me if they are the topic of expert testimony they go to the issues that are for the Court to decide and not the Jury to decide and for that reason I am not permitting it and, number three, I don't think there [p. 5498] is anything in his testimony that makes a fact that the Jury has to resolve that bears upon the facts that the Jury has to revolve. It seems to me that he is talking about matters that are for the Court after I get the Jury verdict and I understand you are continuing to object to the reading of his testimony in its entirety, Mr. Reveal?

MR. REVEAL: Yes, sir.

THE COURT: And you are continuing to offer it, Mr. Farrow?

MR. FARROW: I would like to note, Your Honor, that if the Court takes the position that it is the determination to be made by the Court as opposed to the Jury –

THE COURT: The determination of the issues he addresses is what I am talking about.

MR. FARROW: If the issues we are talking about are ones dealing with the – we call them generally the chilling affects –

THE COURT: You are talking about balancing effect?

MR. FARROW: If they are to be the ones the Court is to make the decision on as opposed to the Jury it seems to me I want to note now, and we can discuss it perhaps tomorrow if we need to some more, that that decision ought to be made before our issues are put to the Jury because what you have got now is that you have a record with the city telling the city witnesses and the CASP witnesses telling the Jury there

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[p. 5523] and the Mayor signed the franchise ordinance on that same date. November 14, 1983.

On December 5, 1983 several months after the lawsuit had been commenced, Mr. Farrow sent a letter to the Mayor and to the members of the City Council requesting that the city issue a cable television franchise on terms at least – issue Nor-West a cable television franchise on terms at least as favorable as the franchise recently issued to Continental.

I have placed on the easel before you an enlargement of Mr. Farrow's letter. Let me move that just a bit closer if I might.

The letter further indicated that upon the issuance of a franchise identical to the franchise issued to Continental that Nor-West would seek from the Minnesota Cable Commission Board of certificate of confirmation.

Because of the already pending lawsuit filed by Nor-West which sought damages and an injunction and an order invalidating the franchise award to Continental,

and because the city's entire franchising process had been called into question by Nor-West's complaint, as well as the integrity of both elected and appointed officials of the City of St. Paul, that request contained in Mr. Farrow's letter was denied.

Mr. Farrow's letter is significant for two reasons: first it is the very first time that Nor-West ever requested the issuance of a second franchise from the city and, although [p. 5524] Nor-West has argued and intimated over the course of the last 8 weeks that its earlier original complaint filed against the city was tantamount to a request for a second franchise, the evidence is to the contrary. Nor-West was specifically asked in interrogatories that were read to you over the course of the trial to identify "any and all meetings, discussions, or other oral communications in which Nor-West recommended or requested that the City of St. Paul issue more than one non-exclusive cable television franchise". Its response was as follows: "Nor-West is not at this time aware of any".

In the same interrogatories that were read to you Nor-West was asked to identify "any and all documents in which Nor-West recommended or requested that the City of St. Paul issue more than one non-exclusive cable television franchise". Nor-West's response was as follows "see letter from Nor-West's attorney Harold Farrow to Mayor Latimer and City Council dated December 5, 1983; and letter from Nor-West's attorney Harold R. Farrow to the city's attorney Ernest Reveal dated December 28, 1983. That is the first letter that is referred to in the answer, an that is the first request that Nor-West ever made for a second franchise to operate in competition with Continental.

I believe the court will instruct you that a party is bound as a matter of law by the admissions made in answers to interrogatories. As a result there is simply no room for any [p. 5525] argument as to when the first time was that Nor-West requested the issuance of a second franchise.

Now the other significance of Mr. Farrow's letter relates not so much to timing, but rather what it was that was being asked of the city. Against what I read to you from the letter is significant. What Nor-West requested was the issuance of a cable television franchise identical to that issued to Continental Cablevision. That is a system that would have been built throughout the city, including the downtown area; would have provided for an institutional network; would have provided support for access and local origination, programming; made commitments for municipal uses and would in all other respects be identical to the franchise issued to Continental pursuant to it proposal which is contained in the 8 volumes that are found on counsels table behind the easel here.

In marked contrast the system which Nor-West seeks to build today remains a mystery unknown to its own partners, and apparently even to its expert witnesses who testified in this case.

On January 10, continuing with our chronology, January 10, 1984, Nor-West filed a complaint with the Minnesota Cable Communications Board seeking denial of the issuance of a certificate of confirmation to Continental or, in the alternative, a contested case hearing. Under state law a certificate of confirmation had to be issued by the Cable Board

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[p. 5531] As I said earlier the August 2nd 1983 date has no particular significance other than to fix as a point of reference the date on which the Mayor signed the City Council resolution designating Continental as the franchisee. In addition I remind you that Nor-West admitted in its answers to interrogatories that the first date on which they requested the issuance of a second franchise was December 5, 1983, the date of Mr. Farrow's letter.

Now having established both of those things it is next necessary for you to determine for purposes of Questions 1, 2 and 3 of the Special Verdict Form what cable television system Mr. Farrow's letter requested permission to build and for the reasons that I have already mentioned, set forth in the text of Mr. Farrow's letter, itself, that system is identical to the franchise that had been issued to Continental some months earlier. Thus for purposes of Question One relating to financial ability, Nor-West must demonstrate that it had the financial ability necessary to design, construct and operate a system that would have been identical to that described in the ordinance awarding a franchise to Continental. And, based upon the testimony of Mr. Hostetter and Mr. White, both from Continental, the cost of constructing that system totaled some 43 and a half million dollars including both costs of construction and capitalized expenses which are appropriately, from an accounting standpoint, treated as capital costs and

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[p. 5542] express or, alternatively which could have been the basis for the city's denial of Nor-West's proposal. Inevitably then you must conclude with respect to the

third element of plaintiff's burden of proof, that is whether or not the city used the request for proposal process to discourage the expression of Nor-West's viewpoints, and since Nor-West had no viewpoints there is no viewpoint which the city could possibly have discouraged even if it had been of a mind to do so. Nor, in a broader sense is there any evidence that the content of programming played any part in the City Council's decision to ultimately award a franchise to Continental as opposed to Nor-West. This too was conceded by the partners in their testimony.

In short, I submit that you need not deliberate very long with respect to reaching the inevitable conclusion that the answer to Question Number Four is also "no".

Question Number 5: "at this time does Nor-West have the financial ability necessary to design, construct and operate the cable television system it has requested permission to build in competition with Continental Cablevision in St. Paul"?

Just as the evidence was clear in 1983 that Nor-West hoped to borrow the bulk of funds required to build and operate the cable television system which it then proposed, it is equally clear that Nor-West still hopes to obtain financing today.

[p. 5543] For example you will recall Mr. Keefer testified in his 1987 deposition that Nor-West still intended to obtain financing and he admitted on the witness stand during the course of his testimony here that he was unaware of anything that would alter his opinion today. However, Nor-West has not offered any evidence of an existing commitment for financing. And

certainly there is no more reason to believe today that the remaining partners would liquidate their present assets in order to fund the construction and operation of a cable television system than there was in 1983. In fact, even if the remaining partners disposed of all of their assets they still would have insufficient funds to build a cable television system identical to Continental, at a cost of 43 and a half million dollars. They simply don't have the resources with which to do that. Even if Nor-West were to build a significantly less costly system along the lines described by Nor-West experts who testified in this case, the partners would nevertheless still have to sell the bulk of their assets and pay substantial income taxes on the gains realized on the sale, which is the other reason why I submit to you that it is most improbable that the partners would intend to fund the cost of construction entirely out of their own pockets.

Furthermore there is no reason to believe that the remaining partners would be any more willing to put substantially more of their own money at risk in St. Paul than

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[p. 5546] his earlier characterization of this as a kamikaze mission, he would have been here to testify about his company's interest and/or willingness to participate in an overbuild. But he wasn't, and in fact there is no evidence that has been put before you that any cable company would have, with the necessary technical expertise, would have any interest in participating in an overbuild and in constructing and managing a system for

Nor-West today. For those reasons the answer to question Number 6 must also therefore be "no".

Question number 7, if Nor-West were given the opportunity at this time to build the cable television system it requested – it has requested permission to build in competition with Continental Cablevision in St. Paul, would Nor-West build such a system?"

With respect to this question two observations need be made. First, as of today the only cable television system which Nor-West has ever requested permission to build in competition is the one requested in Mr. Farrow's letter. That system was to be on terms at least as favorable as the terms and conditions issued in the franchise to Continental.

Nor-West's experts at trial have suggested that – excuse me – that Nor-West would build a pared down system which would cost less to build, provide fewer services, and would not be available to everyone, within the City of St. Paul specifically and in particular the downtown area apparently.

[p. 5547] Significantly the evidence is undisputed that Nor-West has never requested permission to build a pared down system that its expert witnesses referred to. it has never been discussed in any form, at any time before the St. Paul City Council and therefore the evidence is uncontroverted that Nor-West does not intend to build what it requested back in 1983.

Second, Nor-West cannot decide what it would build today in competition with Continental if given the opportunity to do so. As of the date of Mr. Farrow's letter of

December 5, 1983, Nor-West was seeking to build a system on terms identical to Continental's. Yet, when asked in their depositions in 1984, what system is Nor-West ready, willing and able to build in St. Paul in competition with Continental, each of Nor-West's remaining partners testified that the system that they would build is the system they originally proposed to the city in March of 1983.

In August of 1987 Nor-West's experts proposed a far less costly system that I referred too before, but disagreed among themselves as to what the cost of construction would be, with ranges varying between 19 million dollars I believe Mr. Cushing testified to, up to twenty-five million dollars as I, believe Mr. Stern testified to. That, system, whatever form it might ultimately take, at least in the mind of Nor-West experts, has never been proposed to the city.

And, finally, when Nor-West's own partners today were [p. 5548] asked on the stand what it was that they proposed to build, none of them could articulate what that system would look like. After five years of litigation Nor-West should have some idea of what, if anything, it seeks to build. And, by definition, if Nor-West doesn't know what it intends to build, it cannot prove that it would build that system. And, that question, excuse me, the answer to Question Number 7 must therefore be "no".

Now let me jump ahead in the special verdict form to Questions 11 through 18 which deal with the city's interests and then return later to questions 8, 9, 10 that deal with damages.

The first interest identified is referred to in special verdict Number 11 which reads: "As they existed in 1983 could the public facilities and rights of way in St. Paul have been able, by reasonable rearrangement, to accommodate more than one cable television system?"

The only persuasive evidence in the record regarding question Number 11 is the testimony of Mr. Baer and Mr. Garwood, both from – or formally from Continental; Mr. Fry from Northwestern Bell Telephone; Mr. Weber from Northern States Power Company and Mr. Ken Knuth who was the expert witness called by the city.

Each of those persons had personal knowledge of the state of the pole plant and rights-of-way in St. Paul as they existed in 1983. These witnesses not only corroborate one another but they also establish that the public facilities and

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[p. 5607] can not be based on conjecture or speculation; for all of those reasons I submit that the answer to question 9, and 10 must be zero in each case.

As I told you at the outset Nor-West claims in this case are a complete fairy tail. Nor-West has never been ready willing and able to build and operate a cable television system in St. Paul in competition with Continental; not in 1983 not now.

Furthermore the evidence is overwheiming that Nor-West has never truly intended to build and operate a cable television system in St. Paul in competition with Continental. This lawsuit is merely a concocted substitute for Nor-West's having been denied the franchise which

they originally sought from the city, namely the single non-exclusive franchise which the city chose, for good and sufficient reasons, to award to Continental instead.

What they seek is an award of millions of dollars of damage from the city for being denied the opportunity to build a cable television system in competition with Continental, something that they have never actually intended to do at any time, and perhaps the best evidence of that is their inability to tell you what it is they would build even if given the opportunity to do so.

There are compelling and substantial reasons supporting the decision to limit the number of cable franchises which it

* * *

[p. 5750] In making your findings of fact you must not be influenced by your own views or opinions or by the opinions of any witness or the opinions have any of these attorneys as to whether the plaintiff's First Amendment rights may or may not have been violated. Your job is to simply answer the questions, the special verdict questions, based upon the evidence; and I then will apply the law to those facts as you find them, the facts, to be.

The First 3 questions you must answer on the special verdict form relate to whether or not – I am sorry – relate to whether Nor-West was ready, willing and able to be a cable operator in St. Paul in 1983. In other words, was the plaintiff a cable operator who would be entitled to First Amendment protection. To be ready, willing, and able, Nor-West must have possessed the financial ability, the technical capability and the intent necessary to design,

construct, and operate a cable television system in competition with Continental Cablevision in the City of St. Paul.

In order for you to answer Question Number 1 yes, the plaintiffs must prove by the greater weight of the evidence that it did have the financial commitments or ability to purchase, obtain or hire the necessary equipment, employees and facilities, to design, construct and operate a cable television system in the City of St. Paul in competition with Continental. You understand, as I am sure you do, that the cable system that [p. 5751] the plaintiff would have designed, constructed and operated, if it had been given permission, is in dispute between these parties. They don't agree as to what that was. You, as jurors, must determine what system the plaintiff had requested after the August 2nd, 1983 date. So it is your job to decide what system they requested and then determine whether the plaintiff had the necessary financial ability to design, construct and operate that cable television system that you find it requested.

This is not to say that the plaintiff had to actually design and construct and operate such a cable system during '83. Rather, the question is did the plaintiff have the financial ability that would be necessary to design, construct and operate the cable television system it requested in competition with Continental in St. Paul.

Question Number two deals with technical capability. In order to answer yes to question two Nor-West must have proven by the greater weight of the evidence that it

had or could have obtained the practical knowledge necessary to design, construct and operate the cable television system in 1988 in the City of St. Paul that you find it requested. So again you are going to have to resolve that fact dispute as to what system it had requested permission to build. That is whether the plaintiff had or could obtain the specialized expertise required to adequately build and operate that cable television system in competition with Continental in St. Paul.

* * *

[p. 5753] of unlawful intent. It can't prove a state of mind hardly, what is in somebody's mind. An intent to volatile a persons constitutional rights, if it exists, is seldom admitted. But, it may be inferred from the existence of all of the facts and circumstances surrounding the episode. You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts which they knowingly do, or knowingly admit.

As stated earlier it is entirely up to you to decide what facts to find from the evidence. Keep in mind that viewpoint is defined as particular stand on a given issue or set of issues. This is different than merely types of programming offered by Nor-West or other cable operators, although types of programming could be indicative of a particular viewpoint.

Questions Number 5, 6, 7, deal with whether Nor-West today is ready, willing, and able to be a cable operator in St. Paul. To be ready, willing, and able, Nor-

West must possess again the financial ability, the technical capability and the intent necessary to design, construct and operate a cable television system in St. Paul. Again the cable system that the plaintiff proposes to design, construct, and operate, these parties are in dispute about and obviously they don't agree, upon.

Again you as jurors will determine what system the [p. 5754] plaintiff now proposes and then determine whether the plaintiff has the necessary financial ability to design, construct and operate that cable television system, that is the one that you find the plaintiff proposes.

In order to answer Question Number 5 yes Nor-West must have established by the greater weight of the evidence that it currently has financial commitments or ability to purchase, obtain or hire the necessary equipment, employees and facilities to construct and operate the cable system it proposes in competition with Continental Cablevision.

In order to answer Question Number 6 yes, Nor-West must have established by the greater weight of the evidence that it has or it can obtain the practical knowledge necessary to design, construct and operate the second cable television system which you find it proposes in the City of St. Paul, as it has requested in competition with Continental Cablevision.

In order to answer Question Number 7 yes the plaintiff must have established by the greater weight of the evidence that if given the opportunity by the city to build the cable television system which you find it now proposes to build in competition with Continental, Nor-West would in fact build such a system.

That brings us to eight, nine, ten. You must determine the amount of damages, if any, which have been proven under the evidence regardless of how you answer the other special verdict

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90-1653

No. _____

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1991

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP,

Petitioner,

vs.

CITY OF ST. PAUL and CONTINENTAL CABLEVISION OF ST. PAUL, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

APPENDIX – VOLUME II OF PETITION FOR WRIT OF CERTIORARI

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CITY OF ST. PAUL, MINNESOTA

Request for Proposals

Providing Cable Communications Services

to the City of St. Paul, Minnesota

NOVEMBER 1, 1982

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REQUEST FOR PROPOSALS
CITY OF ST. PAUL, MINNESOTA

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1.0 INTRODUCTION

The purpose of this Request for Proposals (RFP) is to seek qualified applicants to provide cable communications service to the citizens of the City of St. Paul, Minnesota. This RFP contains information and instructions relating to the preparation and filing of proposals; conditions and provisions regarding the installation, operation and maintenance of a cable communications system; and the procedure to be used in evaluating applicant proposals.

1.1 Invitation to Applicants

The City of St. Paul (City) hereby invites qualified applicants to submit proposals for a 15-year, non-exclusive cable communications franchise, in accordance with the applicable rules and requirements of the Federal Communications Commission and the State of Minnesota.

The City of St. Paul is seeking proposals from companies committed to the provision of high quality television and communications services over a state-of-the-art broadband cable system. The City recognizes that the economic future of the cable industry is in the wider field of telecommunications. Applicants are, therefore, asked to make a commitment to a total communications network, designed to extend beyond the delivery of programming and entertainment services. This network should have the capacity to provide a broad range of telecommunications and information services, extending maximum benefits to the citizens, institutions, and businesses in the City of St. Paul. Applicants are also encouraged to substantiate their proposals by presenting evidence which supports any offers of service or facilities.

1.2 Proposal Requirements and Desired Services

In preparing this RFP, the City has recognized the value of allowing applicants to develop creative approaches to meeting the communications needs of local subscribers, community organizations, institutions and businesses. Applicants, therefore, have been given substantial latitude in developing their own innovative proposals for cable communications services. The City has,

however, established a limited number of minimum requirements and specifications related to the cable communications franchise.

The following is a summary of the City's *minimum requirements* and *system specifications*, which requires applicants to:

* disclose fully the ownership and control of the cable system;
* avoid the practice of "rent-a-citizen" in the cable franchising process;
* pay an initial franchise fee of five (5) percent on all gross annual receipts;
* make cable available to all homes within the City of St. Paul within three years of the franchise award;
* propose a cable system with the initial capacity for a minimum of 72 downstream and 8 upstream channels for residential subscriber services;
* provide the capability to receive signals from all communications satellites originating cable program services;
* as nearly as possible, allow for narrowcasting to the 17 Citizen Participation Planning Districts designated by the City;
* provide two-way interactive and computer communications capability upon full system activation;
* provide, at cost, an antenna cable switch upon subscriber request;
* provide a separate institutional network;
* set high standards for technical performance;

* present a plan for regional interconnection;
* include emergency alert capability;
* provide the capability to lock-out any and all programming deemed unsuitable for minors;
* carry all VHF and UHF "must carry" signals as defined by the FCC television signals;
* provide a local uplink facility(s) to distribute programs and services by communication satellite to serve the needs of St. Paul residents, institutions, and businesses.
* offer a broad range of cable audio services;
* present a detailed plan for local origination programming and services;
* submit detailed information regarding plans to use local resources;
* propose a comprehensive plan for access, including allocation of channels beyond those required by State law, facilities, equipment, and staff;
* in addition to the above, propose a minimum funding of $100,000 per year to the St. Paul Community Access Corp. and the St. Paul Institutional Access Corp.;
* allocate a minimum of one upstream and downstream 6 Mhz channel on the subscriber network for computer communications;
* provide free drops to the institutional network for selected municipal buildings, City offices, and schools designated by the City, and listed in Appendix B in this RFP;
* establish uniform rates for the installation and monthly charge for all individual residential subscriber services;

* submit a marketing plan including examples of subscriber contracts and marketing materials;

* propose an initial period of rate stability during which no rate increase will be implemented;

* provide a detailed financial *pro forma*; and,

* present evidence and supporting documentation which demonstrate that they have the financial capability to perform in accordance with the ordinance and this RFP.

The City has also requested that applicants provide certain services and facilities which are of particular interest to the subscribers, institutions and/or businesses of St. Paul. These requests should not be interpreted as requirements, however, unless specifically stated.

Applicants are encouraged to provide the following *services and facilities* requested by the City:

* system-wide status monitoring capability;

* place local television stations on cable channels which correspond to their broadcast channels;

* a diversity of programming and entertainment services, including distant broadcast signals, automated text channels and satellite delivered services;

* a varied choice of premium service options, including programming on a pay-per-view basis;

* a variety of cable audio service options on all service tiers;

* programming which will meet the needs of a broad range of special interest groups identified by the City, such as minorities, senior citizens, women, the handicapped, children, etc;

* use existing local facilities and resources in the development of the cable system;

* propose increased installation fees to accommodate unusual circumstances, such as the need for drop cables longer than 200 feet, based on the actual cost of installation;

* present creative plans for the orderly introduction of interactive cable services;

* propose a "universal service tier" without a monthly charge;

* propose discounts on installation and/or monthly fees where heads of households are senior citizens on fixed incomes, handicapped, or economically disadvantaged, as defined by the City;

* specify which institutions will be provided a free drop, beyond those included in the City's minimum requirements;

* propose a set of cable communications services to increase the overall efficiency and cost-effectiveness of government agencies; and,

* conduct a needs assessment of community organizations, non-commercial institutions, local business, and designated representatives of City departments.

The City of St. Paul fully expects to enter into a firm agreement with the successful applicant for the timely delivery of all elements in the applicant's proposal. All items being offered by applicants are considered to be

freely and voluntarily offered, and will be included in the franchise agreement and subject to the enforcement provisions stated therein.

1.3 Legal Qualifications

Evidence shall be presented assuring the City that the applicant complies with any applicable rules and regulations of the FCC, State of Minnesota, and the City of St. Paul regarding ownership and control of regulated licenses, permits or franchises. Specifically, applicants should demonstrate that they are in compliance with the rules of the Minnesota Cable Communications Board regarding the cable franchising process. In addition, applicants should present evidence of compliance with the City's policies regarding the registration of cable lobbyists, and City Council resolutions regarding contact with City officials and employees.

1.4 Character Qualifications

Evidence shall be presented by the applicant as to whether or not the applicant or any principal has ever been convicted or is being charged now or during the course of the franchising in a criminal proceeding where felonies or misdemeanors were charged. Evidence shall be presented as to whether the applicant or any principal has ever been party to a civil proceeding in which it was held there were unfair or anticompetitive business practices, antitrust violations, violations of securities laws, and false/misleading advertisements.

1.5 Ownership and Control of the System

The City encourages applicants to consider creative approaches to structuring the ownership and control of the cable communications system. Applicants are encouraged to propose ownership structures which would allow for the maximum involvement of and financial benefit to the residents of St. Paul. The City has established a number of specific objectives in seeking alternatives to traditional private sector ownership of their cable communications system. These objectives are:

* to distribute more equitably the financial rewards of operating the cable system beyond the stockholders of a private cable company;

* to allow the City to directly benefit from the financial success of the local cable system;

* to increase the level of control the City can exercise over the franchisee; and,

* to reduce the cost of capital for the system and potentially reduce subscriber rates, by allowing the City to use its ability to raise debt funds (for example by issuing revenue bonds).

The City is familiar with many current and past proposals regarding ownership and financing alternatives. Applicants are encouraged to present a plan providing some form of participation in the ownership of the system, either as full equity owners or partners in the entire system or in the ownership, management and control of a specific aspect of the system, for any of the following entities:

* private, local corporations (with special emphasis on minority-owned companies);

* selected private individual investors (with special emphasis on minorities);
* existing private, non-profit institutions;
* the City itself, or a designated City entity;
* the public, in the form of a stock offering;
* the subscribers of the cable system (in the form of a cooperative).

At a minimum, applicants are required to describe and disclose fully those aspects of their proposal related to the ownership and control of the cable system. Applicants are also required to provide detailed information disclosing all agreements and understandings with any persons, shareholders, firms, groups, corporations or associations which have a financial interest in the applicant.

The City specifically seeks to prevent the practice of "rent-a-citizen" in the cable franchising process, where local citizens, organizations, or institutions are solicited to participate in the ownership of a company applying for the franchise without having to invest an amount equal to the equity received.

Therefore, applications will not be accepted if they contain any of the following elements;

* the percentage of stock held by local investors is greater than the actual percentage of dollars (or dollar value of services) actually invested or to be invested);
* local investors have received loans from the cable company with which to purchase stock;
* the applicant or parent company guarantees local investors little or no financial risk;

* the interests of local investors can be bought out readily at a guaranteed price.

1.6 Compensation to the City

The City has established an initial franchise fee of five (5) percent on all gross annual receipts. Applicants should clearly indicate whether they will be willing to support an effort by the City to obtain a waiver of the franchise fee limits required by the Federal Communications Commission (FCC). To eliminate this fee from becoming a bid item, the City will not consider any fee that is different from five (5) percent, or lump-sum cash contributions other than the schedule for the prepayment of fees specified in the Cable Communications Regulatory Ordinance.

The City is also interested in exploring other forms of compensation, beyond the franchise fee. Applicants are encouraged to be creative in proposing innovative approaches for the City to generate revenues as a result of cable development in St. Paul. The City is not, however, interested in obtaining revenue at the expense of subscribers, institutions, and businesses, or through means which could jeopardize the ability of the cable system to maximize its potential.

The following approaches to compensation should be considered by applicants in developing their proposals:

* the allocation of channels to the City which could be leased to third parties who wish to offer programming or communications services;

* the allocation of cable system capacity without charge to allow the City to offer services to

third party customers, such as those who wish to purchase time-sharing use of the City's central computer;

* compensation to the City to cover the cost of playing a role in the delivery of certain cable communications services. For example, the City could develop a local "public database" to be offered for use by subscribers. The City could, therefore, be compensated as would any third party provider for an information service;

* The allocation of a percentage of the profits generated by the franchisee above and beyond those projected in the *pro forma* business plan included in this franchise application;

* A provision which would allocate a percentage of the ownership of the cable communications system to the City or a City-designated entity, or which would allow the City to purchase a percentage of the ownership of the cable system.

1.7 Initial Coverage and Line Extension Policy

The grantee will be required by the City to initially make cable available to all homes within the City of St. Paul. This is a minimum standard which all applicants must meet.

Applicants are required to propose a plan which will complete the construction of both the subscriber and the institutional networks within three years of the franchse award. The City places a high priority on having a construction plan that is non-discriminatory. That is, in so far as it is technically feasible, early service should be available to households of all income levels. A detailed map of

the City is included as Appendix A in the application forms.

1.8 System Design

The City seeks a modern, efficient, and cost-effective cable communications system which will facilitate quality maintenance practices, deliver a variety of marketable services, and provide the flexibility needed to adjust to new developments in technology, programming and services.

The City requires that the cable system have the initial capacity to provide a minimum of 72 downstream and 8 upstream channels for residential subscriber services. To ensure the full utilization of these channels, applicants are required to provide the capability to receive signals from all communications satellites originating cable program services.

In addition, applicants are required to provide a local uplink facility to distribute programs and services by communication satellite with sufficient capacity to serve the needs of St. Paul residents, institutions, and businesses. We encourage this uplink facility be placed within the system. The City requires that the system be designed to allow for narrowcasting to special-interest and geographically defined groups of subscribers. At a minimum, as nearly as possible, the system should allow for narrowcasting to the 17 Citizen Participation Planning Districts designated by the City. Applicants are invited to exceed these minimum requirements.

Applicants are required to provide a separate, dedicated institutional network, designed to accommodate a wide range of services of interest to municipal departments, local institutions and businesses.

Applicants are also required to provide two-way, interactive and computer communications capability on both the institutional and subscriber networks upon full system activation. The proposed system should be designed to accommodate point-to-point, point-to-multipoint, and multi-point data communications on both the institutional and subscriber networks upon system activation. The residential subscriber network should include a "shared-used data network", designed to accommodate data speeds up to 19.2 Kbps for computer communications. The system design should be able to accommodate all simultaneous users.

Applicants are required to set high standards of technical performance which meet or exceed current FCC requirements, and that conform with FAA criteria related to RF interference. Applicants are encouraged to propose system-wide status monitoring capability to allow for immediate response to technical problems and system outages.

1.9 Underground Requirements

Cables should be installed underground at the grantee's cost where all existing utilities are already underground. In future underground installations, all cables shall be installed underground and the franchisee shall bear a pro-rata share of costs.

1.10 Regional Interconnection

Interconnection of origination, access and/or institutional channels with all other cable systems in adjacent areas is a priority for the City. The State of Minnesota requires that all cable systems in the 7-county metropolitan area reserve VHF channel 6 for a regional interconnection channel. Applicants are encouraged to exceed this minimum requirement for interconnection with other cable systems in the metropolitan area. Applicants are required to present a plan describing how such interconnection would be accomplished.

1.11 Emergency Override

The cable communication system shall include an Emergency Alert capability. This capability should permit audio and visual override on all channels and FM signals simultaneously, in the case of public emergencies. Authority to override the system shall be designated by the City. Applicants shall designate a video channel to be used for emergency broadcasts. Such designation shall also be included in the franchise agreement.

1.12 Parental Control Devices

The City requires that applicants provide subscribers the capability to lock-out any and all programming they deem unsuitable for minors. The applicant's plan for fulfilling this requirement should be presented in the franchise proposal.

1.13 Subscriber Program Services

Applicants are encouraged to be creative in their proposals for "basic" programming to meet the variety of interests represented in the community. Applicants are required to carry all local VHF and RHF "must carry" signals as defined by the FCC. The City requests that local television stations be carried on cable channels which correspond to their broadcast channels, as far as it is technically feasible. Applicants will be required to provide an antenna cable switch upon subscriber request.

Applicants should also offer a diversity of programming and entertainment services, including distant broadcast signals and satellite-delivered services on their basic cable package. Applicants are encouraged to provide a varied choice of premium service options, including programming on a pay-per-view basis. Subscribers should also be offered services such as automated text channels, which provide news, sports, financial, and other information. Text channels should also include the display of local information such as calendars of events, announcements, classified advertising, etc.

The City reserves the right to require the franchisee to dedicate up to 4 video channels for the transmission of newly developed telecommunications services such as LPTV, DBS, or other services which become available after the franchise is awarded.

Applicants are required to offer a broad range of cable audio services. Applicants are encouraged to include all local FM and AM radio stations, and a variety of satellite audio services, shortwave, and local non-broadcast audio services. The City encourages applicants

to make cable audio service options available to subscribers of all tiers.

Applicants are encouraged to provide programming which will meet the needs of a broad range of special interest groups identified by the City, such as minorities, senior citizens, women, the handicapped, children, etc. In preparing their programming proposals, applicants are encouraged to review the position papers submitted to the City by a broad range of special interest groups. In addition, applicants are encouraged to conduct their own ascertainment studies in preparing their programming plans.

1.14 Local Origination Programming and Services

The City requires that applicants present a detailed plan for local origination programming and services, including information specifying channel allocations, estimated programming hours, production facilities, staff, and other resources committed to local origination program production.

1.15 Community Access Programming

The City is strongly committed to the concept of community access to the system and seeks applicants who are willing to form a working partnership with the community to foster use of the system by local organizations and institutions. The City intends to create two nonprofit corporations – the St. Paul Community Access Corporation (SPCAC) and the St. Paul Institutional Access

Corporation (SPIAC) – to play a primary role in administering access to the cable system. Though the two corporations will each have a different specific focus, they both will have the same basic functions. These include, but are not limited to, the following:

* conduct initial and on-going needs assessments;

* allocate bandwidth, facilities, equipment, staffing, and funding;

* develop and conduct public information, education, and training programs related to community/institutional uses of cable;

* facilitate the exchange of information and sharing of communication resources for community/institutional uses of the system;

* develop and budget funding sources and revenues;

* work in conjunction with the cable operator to schedule and implement use of the system;

* serve in an advisory capacity to the franchisee for development of job descriptions for access staff, determining equipment, ascertaining community needs, etc.

It should be noted that it is *not* the intent of the City that all institutional uses of the cable system be channeled through the St. Paul Institutional Access Corporation. Rather, the goal is to provide a way of administering any video, audio, or text resources that are allocated to stimulate institutional uses of the system. Likewise, the St. Paul Community Access Corporation is designed to focus on the same types of applications. The City does,

however, acknowledge that the communication environment is changing rapidly and that the two access corporations may wish to change the scope of their activities in the future. The City asks applicants to remain open to explore other types of community uses of the system with the two corporations over the course of the franchise.

The City recognizes that the terms "institution" and "community" can be interpreted in many different ways. To facilitate the allocation of resources and the establishment of the corporations, the City has adopted the following guidelines covering the composition of each corporation. Participants in the Institutional Access Corporation shall include: public or private non-profit educational institutions, for-profit and non-profit health institutions (hospitals, clinics, etc.), libraries or library councils not operated by the City. These must be located within the City of St. Paul or must provide an important service to a significant portion of St. Paul residents. Local governments and businesses are not included.

Participants in the Community Access Corporation shall include: neighborhood organizations, religious organizations, special interest groups such as women's and minority organizations, the handicapped and hearing impaired, cultural organizations and entities, social service agencies, unions, individual residents of St. Paul, and other St. Paul organizations that would not be eligible to participate in the Institutional Corporation. Local governments and businesses are not included.

Applicants are required to make significant ongoing commitments to community access programming. The

City has adopted the following guidelines for access offerings:

* applicants are required to provide the channels mandated by State cable law (one channel each for public access, government access, educational access, leased access, and regional channel 6).

* applicants are required to propose additional channels to meet community needs. Some should be allocated to the SPCAC and some to the SPIAC. The block of institutional channels should include channels on the subscriber and institutional network.

* applicants are required to propose facilities, equipment, staff and operating budgets (that include equipment maintenance), as prescribed in State cable law, based on community needs assessments. Some of these facilities and/or equipment should be for priority use by institutions and some for priority use by the community.

* at least one of the access facilities must be equipped to accommodate the handicapped and hearing impaired.

* applicants are encouraged to place access channels on lower cost tiers of service in so far as possible.

* any access facility that is established must meet the following criteria:

  a) must have flexible operating hours, including week-day, evenings, and weekends.

  b) adequate parking facilities.

  c) with security.

d) reasonably accessible to public transportation.

* applicants are encouraged to propose a range of equipment and facilities such as:

  a) studios to accommodate different types of uses and users.

  b) audio production and video production equipment/facilities.

  c) portable video units as well as studio equipment.

  d) cablecasting and editing facilities with time base correctors to synchronize equipment.

  e) a pool of modulators, character generators, and keyboards dedicated to access users.

  f) provide access to, at reasonable rates, any new technology that becomes available such as digital special effects, generators, and computer editing equipment.

* applicants are required to propose funding to support community uses of the system in addition to the basic access resources required above, with $100,000 as a yearly minimum. These funds will be administered by teh two access corporations, and applicants should specify an amount for each.

Proposals for community and institutional access should demonstrate an understanding of local needs and desires arrived at through comprehensive needs assessments. A broad range of local non-profit institutions and organizations have submitted position papers to the City describing their needs regarding access to the cable system. Applicants are encouraged to review these and other

materials. The City does, however, wish to avoid the approach where-by local organizations are offered funds or facilities for the purpose of influencing the award of the franchise. Instead, the City will endeavor to evaluate a company's overall commitment to the development of local programming within the context of the total proposal.

Applicants should also propose a policy as to when, how, and under what circumstances additional channels will be allocated for community access use. Expansion of the number of community access channels should be facilitated by an automatic trigger mechanism whereby an additional channel(s) could be made available after a specific percentage of time (i.e., during a portion of a day), is used for programming.

The City reserves the right to negotiate the final details of the access plan with the successful applicant, so long as the terms do not impose any new financial requirements on the applicant.

1.16 Home Interactive Service

The City invites applicants to be creative in their plans for the orderly introduction of interactive cable services. The City is particularly interested in keyboard activated systems and related computers and databases. This refers to both local information retrieval (public databases and private school closings, etc.), home banking and shopping, electronic mail, and access to regional and national/international information services. Applicants are also invited to propose more typical services, such as security and medical alert systems.

The proposed home interactive services should eventually be self-supporting and not subsidized by or dependent upon basic subscriber revenues. However, we realize that these services may have to be subsidized for an initial development period. The applicant's discussion of the home interactive services should include a description of the marketing and development effort necessary to achieve independent financial status. Any proposal for a security service must include a separate schedule of rates for installation and monthly service, separate from the rates for basic and pay cable services.

The City has placed a priority on the use of cable system for computer communications services. Applicants are, therefore, required to describe fully their plans for the interconnection of home computers on the subscriber network. In addition to the technical requirements related to system design (described in Section 1.8), the City requires that applicants allocated a minimum of one upstream and downstream 6 Mhz channel on the subscriber network for computer communications. Hearing impaired individuals should have priority access to this bandwidth. In addition, applicants are encouraged to provide units to interface with home terminals that have RS232 and/or RS449 or equivalent inputs to accommodate home computer users.

1.17 Use of Local Resources

Applicants are encouraged to consider the use of existing local resources in the development of their plans for cable communications services. For example, the use of existing local production facilities and talent should be

considered in preparing plans for community access and local origination programming. A variety of possible arrangements should be considered, including the lease and upgrade of existing facilities, contracts with existing production facilities for the development of a specific amount or type of programming, and/or the purchase of programming from local independent producers and other local sources. The City also encourages applicants to consider the involvement of local institutions and businesses in their plans to develop advanced cable communications services, both as service providers and in terms of research and development. At a minimum, applicants are required to submit detailed information regarding their plans to use local resources, facilities, staff, and production capability.

1.18 Subscriber Rates and Tiered Service Structure

The City requires that there be uniform rates throughout the City for the installation and monthly charge for all individual residential subscriber services. These rates should be fully disclosed in the applicant's proposal. Applicants may, however, propose different rates to accommodate "bulk users" provided policies and proposed rates are specified in their proposal. Applicants are encouraged to propose a "universal service tier" which would provide subscribers with a minimum number of access, community programming, and information channels without a monthly charge. Any proposed universal service should, at a minimum, provide the four access channels required, and other program services of interest to special audiences (minorities, senior citizens, women, the handicapped, children, etc.).

This universal teir of service should be designed to minimize subsidization from other subscriber tiers, and reduce the cost of installation by avoiding the use of costly equipment.

Applicants are also invited to propose discounts on either installation or monthly fees where heads of households are senior citizens on fixed incomes, handicapped, or economically disadvantaged, as defined by the City.

The City encourages applicants to propose increased installation fees to accommodate unusual circumstances, such as the need for drop cables longer than 200 feet. These rates should also be fully disclosed, and should be based on the actual cost of installation. Applicants may also propose reasonable charges for regular service calls or relocation. Applicants are required to submit a marketing plan in their franchise proposal, including examples of subscriber contracts and marketing materials.

Applicants are encouraged to propose an initial period of rate stability during which no rate increase will be implemented. At a minimum, rates will remain stable during the proposed construction period, and applicants are encouraged to exceed this minimum requirement. Any modification of subscriber rates proposed after the initial period of rate stability will follow the procedure described in the Cable Communications Regulatory Ordinance, including a specific response period from the City, full documentation from the franchisee, a public hearing, and City access to franchisee financial records.

1.19 Institutional Network Service

Applicants are required to propose a separate, bi-directional institutional cable network to be developed simultaneously with the subscriber network. As a minimum requirement, applicants shall provide free drops to the institutional network for selected municipal buildings and City offices, including public school buildings, public libraries, fire stations, and police stations. These sites have been designated by the City and listed in Appendix B of this RFP. Applicants should also specify which institutions will be provided a free drop, beyond those included in the City's minimum requirements.

The City regards an advanted institutional cable communications network to be a socially and economically desirable resource. The proposed system should have the capability to carry two-way video (wide-band and slow-scan), audio and voice services, text information, and data communications services. The system should be capable of selective interconnection among institutions and with the subscriber network. Provisions should also be made to protect the privacy of data and information transmitted on the system.

The institutional network should eventually be self-supporting and not subsidized by or dependent upon residential subscriber revenues. However, we realize that such a network must be subsidized for an initial development period. The applicant's discussion of the institutional network should include a description of the marketing and development effort necessary to achieve independent financial status.

In this context, applicants are requested to provide a comprehensive management and operational plan for the institutional network, with specific emphasis upon achieving maximum public benefits over the life of the franchise. Public benefits may be defined to include any cost-effective benefits that are expected to accrue to public agencies, businesses, institutions, or residents of the City. The plan should cover the activities of public and private users of the system as well as the activities of the franchise.

Applicants are encouraged to perform an ascertainment of needs for all prospective users of the institutional network. Such users could include municipal departments, hospitals, health care centers, private businesses, public and private schools, cultural institutions, and any other institution(s) the applicant feels could benefit from use of the institutional network. A variety of position papers have been submitted to the City by a broad range of potential users of the institutional network. Applicants should find these documents to be helpful in formulating their proposals. Applicants should provide a list of institutions which have participated in their needs assessment activities, and a description of how the network will be organized and designed to accommodate their needs.

1.20 Municipal Government Services

The City has placed a high priority on the development of cable communications services which will contribute to the overall efficiency and cost-effectiveness of City and other government services. A Citywide Cable

Task Force has been appointed by the Mayor to investigate the applications of cable technology to City government operations and staff activities. This Task Force has prepared a report on the municipal uses of cable television. This report should provide applicants with fundamental information and recommendations regarding the City's use of the cable system.

Applicants are encouraged to supplement this information by conducting their own assessments of the City's communications needs. The City Council has recently adopted a resolution regarding contact between applicants and City employees. These procedures should be followed in conducting needs assessments of City government departments. The needs of other government agencies should also be assessed in this context, and the City has not adopted any policies regarding applicant communication with other government officials.

The City is interested in the use of the subscriber network to distribute information to the public, in both alphanumeric and full video formats. Applicants are required to provide a minimum of one upstream and one downstream video channel on both the subscriber and institutional networks for government access. The City encourages applicants to exceed this minimum requirement, and present an overall plan for municipal government use of the cable system. This plan should include channel allocations, access to production facilities, staff and financial support required for the City to obtain maximum benefits from the development of cable communications in St. Paul.

The City is also interested in playing a significant role in the development of public service applications of home interactive services, especially those which may effect the functioning of City departments (such as police, fire, emergency medical, water, electric, etc.). Applicants are encouraged to present plans to initiate pilot projects and other activities to involve the City in the cost-effective delivery of these services.

The City intends to administer its own channels and cable resources rather than participating in the institutional access corporation. Any channels designated for City use should not be considered part of the institutional or community block of channels.

The institutional network plan should also include provisions for municipal and other government telecommunications services including voice and data communication. Applicants should specify the bandwidth and facilities which will be allocated to municipal and government use, as well as the terms and rates for municipal telecommunications services. The emphasis here should be on cost-effective applications of institutional network services which will result in cost savings for the City.

1.21 Financial Plan

An important feature of the application involves demonstration of financial capability to perform in accordance with the ordinance and this RFP. Failure provide the detailed financial *pro forma* requested may be interpreted by the City as evidence that the applicant is not properly qualified to receive a grant of the franchise.

For purposes of the financial pro forma, Year 1 begins on the date of MCCB Certification. Further, an average annual inflation rate of 7 percent shall be used by all applicants in preparing financial projections.

The *pro forma* data submitted should include plans and terms for debt and equity participation, terms of local ownership participation (if any), financial goals as well as financial projections and assumptions. Tiered service structure, if offered, must be reflected in the disaggregated revenue projections. Adequate documentation of the applicant's assumptions and processes must be provided so that a fair analysis can be made of the projections. The depreciation schedule and expense should be the same as the depreciation method that the applicant intends to use for tax purposes.

Applicants should present evidence of financial resources that assure the company's ability to complete the entire initial service area within the construction period specified in the application. The applicant should clearly distinguish between sources of financing that are confirmed and those that are merely potential, providing supporting documentation (letters, agreements, etc.) for commitments that should be considered firm.

The rates initially proposed by the applicant must be substantiated in the *pro forma* statements by use of realistic levels of penetration. As noted above, applicants should provide adequate documentation of the assumptions and methods used in deriving these figures. To assure the City that the initial rates proposed are realistically calculated to meet the applicants' financial goals, initial rates should be guaranteed until the applicant has

completed all construction (as indicated by the applicant on Form XIII-C) or for three years, whichever period of time is longer. Applicants should, however, include any anticipated rate increases in the *pro forma* projections.

2.0 INSTRUCTIONS TO APPLICANTS

All prospective applicants who plan to apply for the St. Paul cable franchise are required to submit a registration form, which can be obtained from the City's Cable Communications Officer. Applications will not be accepted from companies who have failed to register with the City at least 30 days before applications are due.

One record copy of the applicant's proposal must be received by the City at the following address by 2:00 p.m., February 1, 1983:

Mr. Al Olson, City Clerk
Room 386 City Hall
St. Paul, MN 55102

Within 24 hours of filing a record copy of their proposal, applicants are required to submit forty (40) copies of their application, packaged in individual boxes, and 100 copies of the summary. Applicant proposals must be notarized, and may be filed in person or by registered mail. Applications must be accompanied by a non-returnable fee of $10,000 (in the form of a certified check made payable to the City of St. Paul) to cover the costs or processing and evaluating the applications. In addition, the successful applicant will be required to reimburse the City for any and all costs expended by the City relating to cable communications franchising subsequent to May 31, 1982, not covered by the application fees, including, but

not limited to, any cost incurred by the City in its study of cable communications, preparation of proposal documents, solicitation and evaluation of all applications, and processing of the franchise agreement.

2.1 Form of Proposals

All proposals must be on the official forms provided by the City. The application forms have been designed to furnish all pertinent data that will be used by the City in making its evaluation. Specific instructions for each form are included on the form. Adequate space has been provided for specific and succinct answers to all questions and requests for data. All applicants must use only the pages on the official application forms (or extensions of these pages if, for example, more room is needed to list equipment or provide manufacturer's specifications). Alternative proposal forms are neither desired nor will they be considered. Any attempt to merely use the official form as an "index" to voluminous "boilerplate" may disqualify the applicant from consideration. The official forms have been designed to facilitate comparison of proposals. Evasive, imprecise, or incomplete responses can only serve to the disadvantage of the applicant.

The City of St. Paul reserves the right to extend the deadline for all applications or reject any and all applications, if necessary.

2.2 Clarification of Proposal Documents

If any applicant is unsure about any terms, conditions, or provisions of these specifications or the meaning

or interpretation thereof, the applicant may request information or clarification thereon by submitting such requests in writing to:

Mr. Edward Starr
City Attorney
City Hall
St. Paul, MN 55102

Such requests for information must be submitted no later than thirty (30) days prior to the deadline for filing applications. The City attorney will respond in writing to such requests as promptly as possible. Such responses shall be sent to all known applicants who have been supplied applications. No other interpretation by any other person, whether oral, written or in other form, shall be binding upon the City.

In submitting an application, the applicant shall have evidenced the fact that it agrees that it has no unanswered questions with respect to these specifications, and shall have no basis for withdrawal or modification of its proposal on the basis of misunderstanding.

2.3 Amendment to Proposal

Substantive amendments to proposals will not be considered except to acknowledge involuntary changes, such as a change in ownership due to death. Correction of inadvertent errors submitted prior to the filing deadline will be considered. Correction of errors submitted after the filing date may be considered at the discretion of the City or its consultant, if the applicant submits with its correction sufficient information to prove that the error was inadvertent. Additional information or data may be

requested by the City or its consultant if, in their judgment, it would aid in the preparation of a fair and accurate analysis of the proposal.

2.4 Uniform Data Requirement

The City has compiled information with respect to dwelling units, housing density, demographics, and aerial/underground utilities, provided in Appendix C of this document. For consistency, applicants are required to use this information as the basis for all *pro forma* projections and system construction plans.

2.5 Standards of Ethical Conduct

The City Council has adopted two formal resolutions establishing rules governing contact between applicants, City officials, and City employees. These guidelines have been established to assure complete fairness and honesty to the citizens of St. Paul and the cable industry in connection with the awarding of any cable franchise and further to assure all concerned that there will be a complete public record of all proceedings relating to any such contact. The applicant should recognize that these guidelines are binding, and that failure to adhere to these procedures may, at the City's option, result in a rejection of the proposal submitted by the applicant.

2.6 Franchisee Selection Procedure

The authority to grant a cable television franchise in the City of St. Paul resides with the City Council. The City has appointed a Citywide Task Force on Cable TV to

evaluate those aspects of the proposals relating to municipal uses of the Cable system. While the Task Force will make recommendations regarding the applications, the final selection of a franchisee will be made by a vote of the City Council.

The City of St. Paul has also retained the services of Kalba Bowen Associates, Inc., to conduct an independent evaluation of the proposals submitted by each of the applicants responding to the RFP. Kalba Bowen will begin with a preliminary examination of each proposal in order to assess each applicants' ability to construct and operate a system that will best serve the needs and desires of the residents and institutions of the City of St. Paul.

The preliminary assessment of each proposal submitted will be completed approximately 30 days after the proposals are due. A separate report will be prepared regarding each applicant, including a list of specific questions which will be prepared to be responded to in writing by each of the applicants. A complete set of preliminary assessments will be submitted to the City and each applicant. Applicants will have ten (10) working days to: (1) comment on the analysis of their proposal; and, (2) respond to the questions directed to them. This procedure will allow applicants to comment on and correct any errors in the preliminary assessment, and will allow the consultant to ask specific questions regarding applicant proposals. These responses will be considered an integral part of the franchise evaluation process, and will be incorporated into the final evaluation report.

The City will give attention to the previous history of the applicants' cable franchising in similar environments.

Interviews will be conducted with municipal cable authorities in other cities where the applicants currently operate systems. The City will make specific inquiries as to the fulfillment of franchising promises in cities where an applicant currently owns and operates other cable systems.

Applicants will be given the opportunity to present their proposals orally at public hearings before the City Council. Representatives of Kalba Bowen Associates will attend the hearing(s), and these presentations will be considered an integral part of the evaluation process. We suggest that applicants provide a printed resume of their presentations for Council members and others attending the presentation hearing(s).

After receiving responses to the preliminary analysis of each proposal, Kalba Bowen will prepare a final evaluation report which will include a ranking of all applicants using the criteria specified by the City. These rankings will summarize the findings of the proposal evaluation and will serve to facilitate the final selection process. After the City Council and applicants have received the final evaluation report, Kalba Bowen will make a public, oral presentation describing the findings of its evaluation and the rankings of the applicants on the criteria.

2.7 Evaluation Criteria and Priorities

The City will award the franchise to the applicant who demonstrates the best overall capability and willingness to provide cable communications service to the citizens of St. Paul. All of the information requested herein

will contribute to the evaluation of applicants and the subsequent selection process.

In general, applicants will be judged according to the following criteria:

* compliance with the minimum requirements of the RFP;
* financial resources available to the applicant;
* financial feasibility of the system as proposed;
* proposed rate structure and stability;
* fitness of the applicant and its officers;
* proven management and performance of the applicant;
* ownership structure;
* commitment to education;
* employment and administrative practices;
* technical plan of the cable system;
* technical standards specified in proposal;
* timetable for construction of the system;
* channel capacity and utilization of the system;
* ascertainment of community needs by the applicant;
* commitment to local origination services;
* commitment to local access services;
* home interactive services plan;
* institutional network services plan;
* municipal services development;
* use of existing local resources;
* regional interconnection plan; and,
* equal employment opportunity and affirmative action plans.

The City Council has determined that the following factors will be accorded a preference and will be considered as priorities. The City seeks an applicant who will:

(1) Propose the most comprehensive offering of services, provided that such an offering does not exceed the financial capability of the applicant to construct and operate a cable communications system.

(2) Seek to maximize community participation in the ownership and/or management of the cable system or in one or more features of that system such as the access channels, institutional network or leased channels.

(3) Allocate adequate facilities, funding and staff support to access, public service and local community programming.

(4) Seek to develop services to fulfill the communications and information needs of the City's service institutions and the needs of the City's commercial, business, and financial communities.

(5) Provide service to low-income households by proposing a "universal service" option which would offer the subscribers the access and public service channels for the cost of installation alone.

(6) Demonstrate a commitment to the development of municipal uses of the cable system, specifically placing a high priority on those cable communications services which will contribute to the overall efficiency and cost-effectiveness of City government services.

(7) Makes extensive use of local resources in the development of cable communications services, including the use of existing local production facilities, the involvement of local businesses and institutions in service development, con-

tracts with existing production facilities, the purchase of programming from local independent producers and other local sources.

(8) Demonstrate a commitment to the educational community.

THE CITY RESERVES THE RIGHT TO REJECT ANY OR ALL APPLICATIONS.

2.8 Franchise Schedule

11/1/82	Request for Proposals Released
2/1/83	Cable Company Proposals Due
3/1/83	Kalba Bowen Preliminary Assessment and Requests for Clarification Received by City
3/3/83	Kalba Bowen Preliminary Assessment and Request for Clarification Received by Applicants
3/14/83	Responses Received by Kalba Bowen Associates
3/18/83	Public Hearing for Applicant Presentations
4/22/83	Final Kalba Bowen Proposal Evaluation Report Submitted to City
4/25/83	Oral Presentation of Evaluation Report Made by Kalba Bowen to City Council, Cable Committee and Applicants
4/29/83	Final Selection Made by City Council
5/20/83	Final Negotiation and Ordinance Completion

APPLICATION FOR A CABLE COMMUNICATIONS SYSTEM FRANCHISE

CITY OF ST. PAUL

Application submitted to:

Mr. Al Olson, City Clerk
Room 386 City Hall
St. Paul, MN 55102

Due Date: 2:00 p.m., February 1, 1983

Application Forms

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I. Summary of Proposal

Each applicant should present a clear and *concise* narrative description of the cable television system and services it proposes to provide. Please limit responses to a maximum of 15 pages.

Please cover the following subject areas:

- Overview of Proposal
- Ownership and Management of System
- Financial Commitments
- System Design and Construction
- Signal Carriage and Channel Allocations
- Commitments to Local Origination and Access Programming
- Rates and Rate Guarantees

- Institutional, Business and Municipal Services
- Home Interactive Services

The purpose of this section is simply to provide the reader with an understandable overview of the proposal, not to discuss details which will be covered elsewhere in the application forms.

The applicant must clearly differentiate between those elements of the proposal which it is firmly committed to providing (which will be contractually binding) and those which may be provided.

II. Applicant Identification and Affidavit

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APPLICATION FOR CABLE COMMUNICATION FRANCHISE .....Form II-A

APPLICATION FOR CABLE COMMUNICATION SYSTEM FRANCHISE FOR THE CITY OF ST. PAUL, MINNESOTA.....Form II-B

CABLE COMMUNICATIONS FRANCHISE APPLICANT EXPENSE DISCLOSURE.....Form II-C

CABLE COMMUNICATIONS FRANCHISE – LIST OF APPLICANT PERSONNEL.....Form II-D

II. Applicant Identification and Affidavit

Applicants must state the full name and legal status of the prospective franchise as it would appear in a subsequent license agreement. If an application is made on behalf of another party, full disclosure of all the facts relating to such a party is required, including the names

and addresses of the agent and principal. Failure to furnish this information may disqualify the applicant from consideration. Where the application is submitted by an individual, his legal name must be signed by him or his duly authorized agent. Where the application is submitted by a corporation, association, or partnership, the legal name and address of each principal, director and officer must be given, and the application signed by an official or duly authorized agent.

Form II-A

APPLICATION FOR CABLE
COMMUNICATION FRANCHISE

Applicant's Affidavit

This application is submitted in response to the Request for Proposals of the City of St. Paul, Minnesota, by the undersigned who has been duly authorized to make the representations herein on behalf of the applicant.

Applicant recognizes that all representations are binding on it and that failure to adhere to any such representations may, at the City's option, result in revocation of any franchise that may be granted, in consequence of this application.

The City of St. Paul has adopted two council resolutions which provide a comprehensive policy regarding applicant contact with City officials and employees. The applicant recognizes that these resolutions are binding on it, and that failure to adhere to these procedures may, at the City's option, result in a rejection of the proposal submitted by the applicant.

Consent is hereby given to the City to make inquiry into the legal, character, technical, financial and other qualifications of applicant by contacting any persons or organizations named herein as references, or by any other appropriate means.

Firm Name _____

Applicant's Signature _____

Official Position _____

Date _____

Attest _____

Form II-B

APPLICATION FOR CABLE COMMUNICATION SYSTEM FRANCHISE FOR THE CITY OF ST. PAUL, MINNESOTA

IDENTIFICATION OF APPLICANT

Name of Applicant _____

Address of Applicant _____
(Street)

_____
(City, State, Zip Code)

Telephone _____
(Area Code and Number)

Date _____

Please give name and telephone number of principal to whom inquiries should be made:

Name _____

Telephone _____
(Area Code and Number)

Authorized Signature _____
(Name and Title)

Date _____

Form II-C

CABLE COMMUNICATIONS FRANCHISE – APPLICANT EXPENSE DISCLOSURE

Firm Name _____

Affiant's Signature _____

Official Position _____

Date _____

INSTRUCTIONS

1. List total expenses incurred in seeking the cable television franchise for the City of St. Paul by your local company, and its parent corporation, partner or joint venturer in each of the following categories. Include estimates for expenses you have incurred, but for which you have not yet been billed.*

Expense Item	Amount
Salaries paid to company or organization personnel (local and national)	_____

Contracted services – consultants, attorneys, local spokespersons, lobbyists, etc.	_____
Advertising and public relations (media ads, audio-visual presentations, etc.)	_____
Printing	_____
Studies and surveys	_____
Travel	_____
Other**	_____
	TOTAL

2. Provide information regarding any existing contingency agreements or bonus plans relevant to the franchise application and selection process including, but not limited to, cash, property, stock or stock options.

Signature _____ Attest _____

Date ___

---

* The City will give you 10 days notice sometime after the final public hearing in which to file this form.

** If the total exceeds $5,000 in this category, list individual categories of expenses.

Form II-D

CABLE COMMUNICATIONS FRANCHISE – LIST OF APPLICANT PERSONNEL

Due Date* ___

Firm Name _____

Affiant's Signature _____

Official Position _____

Date _____

INSTRUCTIONS

NOTE: FAILURE TO SUBMIT THIS FORM BY THE DATES SPECIFIED WILL DISQUALIFY YOU FROM CONSIDERATION FOR THE FRANCHISE.

1. Name all employees of the applicant, and of affiliates, subsidiaries and parent companies of the applicant, who are based in the City or represent the applicant in its franchising activity in the City of St. Paul.

2. List names and addresses of all persons (locally and nationally based employees, attorneys, consultants, spokespersons, lobbyists, public relations counsel, local owners, etc.) who have been employed or retained to contact the Mayor, council members or City staff to speak on your company or organization's behalf. For each, describe any compensation that is contingent upon the award of the franchise.

*This form must be completed and submitted with your official application forms, and on the first date of each month thereafter until the final vote of the City Council awarding the franchise.

III. Character and Ownership Information

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OWNERSHIP DISCLOSURE ..... Form III-A

LOCAL OWNERSHIP ..... Form III-B

OWNERSHIP AND CONTROL INFORMATION ..... Form III-C

STOCK INFORMATION ..... Form III-D

OWNERSHIP QUALIFICATIONS ..... Form III-E

CHARACTER QUALIFICATIONS ..... Form III-F

CABLE HOLDINGS OWNED BY APPLICANT AND PRESENT SUBSCRIBER RATES ..... Form III-G

SPECIALIZED CABLE SYSTEM EXPERIENCE ..... Form III-H

FORMER FRANCHISE ..... Form III-I

Form III-A

OWNERSHIP DISCLOSURE

Applicants, including all shareholders and parties with any financial interest in the applicant, must fully disclose all agreements and understandings with any person, firm, group, association or corporation with respect to the franchise and the proposed system. This includes agreements between local investors, attorneys, lobby groups, consultants, etc., and the applicant or its principals, affiliates or parent company. Failure to reveal such agreements will be considered withholding of pertinent information and will be considered cause to withhold or revoke award of the franchise.

Please append copies of any written agreements made regarding the ownership or control of the proposed system. Use the space provided to outline any oral agreements or understandings regarding the ownership or control of the proposed system.

Form III-B

LOCAL OWNERSHIP

The City specifically seeks to prevent the practice of "rent-a-citizen" in the cable franchising process, where local citizens, organizations or institutions are solicited to participate in the ownership of a company applying for the franchise without having to invest an amount equal to the equity received.

Therefore, an applications will not be accepted if it contains any of the following elements:

- the percentage of stock held by local investors is greater than the actual percentage of dollars (or dollar value of services) actually invested or to be invested;
- local investors have received loans from the cable company with which to purchase stock;
- the applicant or parent company guarantees local investors little or no financial risk;
- the interests of local investors can be bought out readily at a guaranteed price.

If any owners listed are considered local, in terms of residing or having a place of business within the Twin Cities metropolitan area, provide the following information for each such local owner:

- *Basis for Acquiring Ownership* – Indicate whether ownership was acquired at same per-share cost as other owners, and if not, whether services or other in-kind contributions are included as a basis for acquiring ownership. Provide a copy of the contractual agreement.

- *Buy-out Agreement* – Indicate whether a buy-out agreement exists, whether written or verbal, giving other stockholders the right to acquire the interest of local stockholders in the future.

- *No Risk Guarantee* – Describe any guarantee that would reduce the financial risk of local investors.

- *Loans* – Describe any loans from the applicant or parent company.

- *Ownership in Other Communications Media* – Indicate whether any local ownership in other mass communications media (defined as television stations, radio stations or newspapers) in the Twin Cities metropolitan area.

Form III-C

OWNERSHIP AND CONTROL INFORMATION

(Reproduce original forms if needed)

1. To be completed by all principals, officers and directors of applicant, and by beneficial owners of 1 (one) percent of the stock or other ownership interest in applicant. Beneficial owners include, but are not limited to, individuals, corporations, partnerships, joint ventures and unincorporated associations.

Name (if individual) _____

(if organization) _____

Address _____
(Number) (Street)

_____
(City) (State) (Zip)

Nature of Interest: [ ] Partner

[ ] Stockholder/Owner

[ ] Officer

[ ] Corporate Director

Profession or Occupation _____

Name of Employer _____

Address of Employer _____

Number of shares of each class of stock or ownership interest (including stock options, stock subscriptions and partnership options): _____

Percentage of ownership of partnership, voting stock or equity interest: _____

To be completed by each organization corporation which filled out Page 1 of Form A (not individuals).

2. List all principals, officers, corporate directors, and beneficial owners of three (3) percent or more of your own stock or ownership interest.

Name of Organization _____

Address _____
(Number) (Street)

_____
(City) (State) (Zip)

Name	Address	Capacity	Ownership Percent

FORM III-D

STOCK INFORMATION

Please answer the following concerning the corporation.

1. Is the applicant a publicly held corporation as defined by the rules and regulations of the Securities and Exchange Commission? [ ] Yes [ ] No

2. Stock of corporation:

Class of Stock	Par Value	Vote Per Share	No. Shares Authorized	No. Shares Issued	No. Shares Subscribed	Total No. Stockholders

3. Does the applicant have any other obligations or securities authorized or outstanding which bear voting rights either absolutely or upon any contingency?
[ ] Yes [ ] No

If "yes," submit a statement of (a) the nature of such securities, (b) the face or par value, (c) the number of units authorized, (d) the number of units issued and outstanding, (e) the number of units, if any, proposed to be issued, and (f) the conditions of contingency upon which securities may be voted.

4. Is applicant corporation directly or indirectly controlled by another corporation or legal entity?
[ ] Yes [ ] No

If "yes," please explain.

Form III-E

OWNERSHIP QUALIFICATIONS

1. Does the applicant, or any person or business entity having any interest* in applicant, directly or indirectly own, operate, control, or have an interest in any of the following:**

a. A national broadcast television network (such as ABC, CBS, NBC); or [ ] Yes [ ] No

* For purpose of this form, "interest" includes, in the case of corporations, officers and directors, and stockholders owning 1 percent or more of the company's outstanding voting stock.

** An affirmative response to Question 1, (a)-(d) may constitute disqualification of an applicant if Federal Communications Commission (FCC) cross-ownership rules prohibit such an applicant from investing in cable systems (see 47 CFR s/s 63.45 and s/s 76.501).

b. A television broadcast station whose predicted Grade B contour, computed in accordance with Section 73.684 of the FCC's rules, overlaps in whole or in part of the service area of such system, or an applicant for a license to operate such a station; or [ ] Yes [ ] No

c. A television translator station licensed to the community of such system; or [ ] Yes [ ] No

d. A telephone company whose service area includes the community [ ] Yes [ ] No

e. A newspaper having local circulation within the community [ ] Yes [ ] No

f. An AM or FM radio station whose broadcast signal is normally available off-air in any part of the service area or an applicant for a license to operate such a station. [ ] Yes [ ] No

2. If "yes" to any of the above, indicate below, with full identifying particulars, the nature and extent of such ownership operation, control or interest.

Name of Applicant, Person or Entity: _____

_____

Nature of Interest: _____

_____

Company in Which Interest Held: _____

_____

Name of Applicant, Person or Entity: _____

_____

Nature of Interest: _____

_____

Company in which Interest Held: _____

_____

3. Is the applicant a U.S. citizen? [ ] Yes [ ] No

4. Is the applicant a U.S. corporation? [ ] Yes [ ] No
If "no" describe in detail.

5. If "no" above, state any ownership retained by persons or entities which are not U.S. citizens or corporations.

Form III-F

CHARACTER QUALIFICATIONS

1. Has the applicant (including parent corporation if applicable) or any principal* ever been convicted in a criminal proceeding (felonies or misdemeanors) in which any of the following offenses were charged?

a. Fraud [ ] Yes [ ] No

b. Embezzlement [ ] Yes [ ] No

c. Tax evasion [ ] Yes [ ] No

d. Bribery [ ] Yes [ ] No

e. Extortion [ ] Yes [ ] No

f. Jury tampering [ ] Yes [ ] No

g. Obstruction of justice (or other misconduct affecting public or judicial officers' performance of their official duties) [ ] Yes [ ] No

---

* For purposes of this form, "principal" means any officer or director of applicant, and any person, firm, corporation, partnership, joint venture or other entity, who or which owns or controls 1 percent or more of the voting stock (or any equivalent voting interest of a partnership or join venture) of an applicant.

h. False/misleading advertising [ ] Yes [ ] No

i. Perjury [ ] Yes [ ] No

j. Anti-trust violations (state/federal) [ ] Yes [ ] No

k. Violations of FCC regulations [ ] Yes [ ] No

l. Conspiracy to commit any of the foregoing offenses [ ] Yes [ ] No

m. Any other felony [ ] Yes [ ] No

2. If "yes" attach separate statement providing specifics such as date, court, sentence or fine, etc.

3. Has the applicant or any principal ever been a party to a civil proceeding in which it was held liable for any of the following or is now a party to the proceeding?

a. Unfair or anticompetitive business practices [ ] Yes [ ] No

b. Violations of securities laws (state/federal) [ ] Yes [ ] No

c. False/misleading advertising [ ] Yes [ ] No

d. Violations of FCC regulations [ ] Yes [ ] No

4. If "yes", attach statement providing specifics.

5. Has applicant or any principal ever had a business license (defined to include FCC licenses, alcoholic beverage and restaurant licenses, etc.) revoked, suspended or the renewal thereof denied or is a party to a proceeding that may result in same?

[ ] Yes [ ] No

6. If "yes", attach statement providing specifics.

7. Has applicant or any principal ever, as a result of an adjudicated proceeding, been found in violation – other than routine service complaints – of any franchise agreement, contract, or regulation governing

their cable communications systems owned or operated by them? [ ] Yes [ ] No

8. If "yes", attach statement providing specifics.

9. Has applicant or any principal ever initiated litigation against a franchising authority or had a franchising authority initiate litigation against it?
[ ] Yes [ ] No

10. If "yes", attach statement providing specifics.

Form III-G

CABLE HOLDINGS OWNED BY APPLICANT AND PRESENT SUBSCRIBER RATES

Please list all holdings (franchises and systems) in which applicant or any principal* owns 1 percent or more of equity interest. (If additional pages are needed, please reproduce this form)

_____

Location of System _____

Date of Franchise Award or Acquisition _____

Households Passed by System
Total Subscribers to System
Plant Miles of System _____

Date First Subscribers Served _____

Date Construction Completed _____

* For purposes of this form, "principal" means any officer or director of applicant, and any person, firm, corporation, subsidiary, joint venture or other entity, who or which owns or controls 1 percent or more of the voting stock (or any equivalent interest of a partnership or join venture) of an applicant.

Percentage of System
Ownership Held

Holder of Controlling
Ownership Interest

Current Subscriber Rate

Date Rate Approved

Name, Address, and Phone
No. of Local Government
Officials Responsible
For Cable Operations

Form III-H

SPECIALIZED CABLE SYSTEM EXPERIENCE

List at least one, but no more than four of the applicant's systems which are evidence of the applicant's special qualifications and experience in cable television operation. Provide on a separate page a brief narrative of each system's special features. Select, if possible, communities with similar characteristics to St. Paul with a cable system constructed within the past ten years.

Name of local company:

Community:

Address:

Date of award of franchise:

Date construction commenced:

Percentage of construction completed:

Number of subscribers:
- A. Basic
- B. Pay

Homes passed by cable:
- A. At present
- B. Within 5 yrs. (proj.)

Strand or route miles of plant presently in place:
- A. Aerial
- B. Underground

Local programming per typical week (hours):
- A. Automated
- B. Nonautomated
  1. Locally originated
  2. Access channels

Institutional Network:
- A. Trunk mileage
- B. Services

Municipal Cable Services:

Form III-I

FORMER FRANCHISES

Applicant or any principal* shall list every community where it has received a cable television franchise or operated a cable system without a franchise and subsequently disposed of all or a majority of its interest. (If additional pages are needed, please reproduce this form.) Applicants shall also list communities where franchises were held but not renewed.

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* For purposes of this form, "principal" means any officer or director of applicant, and any person, firm, corporation, subsidiary, join venture or other entity, who or which owns or controls 3 percent or more of the voting stock (or any equivalent voting interest of a partnership or joint venture) of an applicant.

Name of System	Community	Date of Fran/Perm Award	Date of Fran/Perm Disposition	Reason and Manner of Disposition

IV. Administration and Regulation

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EMPLOYMENT TRAINING AND PROCUREMENT PRACTICES — Form IV-A
CONSUMER COMPLAINT AND REPAIR PROCEDURES — Form IV-B
SUBSCRIBER RIGHTS OF PRIVACY — Form IV-C

Form IV-A

EMPLOYMENT PRACTICES

1. Present plans for compliance with all federal, state and local laws pertaining to discrimination, equal opportunity employment programs and affirmative action programs. Include your policies on hiring and utilization of minorities in job training, management, engineering, search committees, announcing and filling job vacancies and contracting policies.

2. Describe policies on using union labor for system construction, operation and/or maintenance.

3. Appendix E contains a copy of St. Paul's Set-Aside Ordinance. Applicants are asked to describe to what

extent they will voluntarily commit to adopting the letter and spirit of this ordinance if they are awarded the franchise.

4. Appendix E contains a copy of St. Paul's compliance review reporting form, along with a list of definitions of terms and job categories. The City will be asked applicants to fill out the "Compliance Data" section of the form for a selected group of their systems. More detailed information and instructions will be distributed after the RFP release. Applicants will have at least 30 days notice, and will be expected to include the information as part of their proposal.

Form IV-B

CONSUMER COMPLAINT AND REPAIR PROCEDURES

The franchisee will be required to provide subscribers with clear and comprehensive written disclosure of all price, service, refund and complaint policies prior to the consummation of subscription or user transactions. The franchisee must clearly describe the standard of service to which it intends to adhere so that consumers and the City can readily determine whether the actual services provided are in conformity with those standards.

The franchisee shall be expected to repair system outages affecting a substantial number of subscribers on an emergency twenty-four (24) hour basis. When service interruption can be anticipated, the franchisee shall notify subscribers in advance.

1. Describe in detail the applicant's policy for handling consumer complaints, inquiries and repair requests. Describe how this policy will be implemented.

2. Hours of office operation will be:

Mondays - Fridays:	___ am to ___ pm
Saturdays:	___ am to ___ pm
Sundays & Holidays:	___ am to ___ pm

3. How soon after a trouble call is received will a service employee be required to respond either by telephone contact with subscriber for an appointment, or by a visit to the premises, or by a doorknob hanger if no one is home?

Within 24 hours	[ ]
Same Day	[ ]
Close of next business day	[ ]
Within ___ hours	[ ]
Other	[ ]

4. How will trouble calls be received outside normal business hours?

Company employee on 24 hour shift	[ ]
Electronically recorded	[ ]
Answering service	[ ]

5. Describe the applicant's plans for responding to major system outages.

Form IV-C

SUBSCRIBER RIGHTS OF PRIVACY

The cable franchises must be especially aware of and responsive to the privacy needs of subscribers. Applicants should be aware that the Minnesota Cable Communications Board has adopted rules which govern the

actions of communications companies regarding subscriber privacy. Applicants should also review the proposed franchise agreement, specifically those provisions which relate to subscriber privacy.

1. Identify all present and projected uses of the cable communications system where questions of subscriber privacy can be expected to arise (including such uses as electronic funds transfer; consumer purchasing of goods, services and programs via cable; opinion polling; information relating to individual subscriber viewing data; and the transfer of medical or other sensitive data by cable), and describe in detail the policies and procedures designed to protect subscriber privacy.

2. Describe in detail what measure will be taken initially and on an ongoing basis to protect consumer privacy and to inform subscribers as to how information is to be collected, stored or used; to inform subscribers of their privacy rights; to insure that information collected is up-to-date, accurate and relevant; to guarantee that information collected for one purpose is not used for any other purpose without the subscriber's prior written consent; and to inform subscribers that information is being collected about them.

3. Describe the remedies for breach of subscriber privacy which the applicant will make available to subscribers. Detail procedures for privacy complaint resolution.

4. Describe the technology to be used to ensure parental control over programming at the subscriber end.

V. Proposed Signal Carriage and Channel Allocations

Table of Contents

LOCAL BROADCAST SIGNALS: FULL-TIME	Form V-A
IMPORTED TELEVISION BROADCAST SIGNALS	Form V-B
TELEVISION BROADCAST SIGNALS PROPOSED FOR PART-TIME CARRIAGE	Form V-C
AUTOMATED PROGRAMMING	Form V-D
NONAUTOMATED PROGRAMMING VIA SATELLITE	Form V-E
NONAUTOMATED PROGRAMMING: SYSTEM ORIGINATED	Form V-F
DESIGNATED ACCESS CHANNELS	Form V-G
PAY CABLE SERVICE	Form V-H
PAY CABLE SERVICE: PER PROGRAM	Form V-I
SUMMARY OF CHANNEL ALLOCATIONS	Form V-J
AUDIO SERVICE	Form V-K
NON-BROADCAST AUDIO SERVICE	Form V-L

Form V-A

Proposed Signal Carriage and Channel Allocations

Service Tier No. ___ (if applicable)

1. Broadcast Television Channels

a. Local Broadcast Signals (carried full-time):

Network Affiliation*	City	Call Letters	Broad-cast Channel	Cable Channel	Proposed Activation Date**

* For example, ABC, CBS, NBC, PBS, independent, other.

** Specify proposed activation date if other than initial date.

Form V-B

Proposed Signal Carriage and Channel Allocations (cont'd.)

Service Tier No. ___ (if applicable)

1. Broadcast Television Channels

b. Imported television broadcast signals (carried full-time):

Network Affiliation*	City	Call Letters	Broad-cast Channel	Cable Channel	Proposed Activation Date**

* For example, ABC, CBS, NBC, PBS, independent, other.

** Specify proposed activation date if other than initial date.

Form V-C

Proposed Signal Carriage and Channel Allocations

Service Tier No. ___ (if applicable)

1. Broadcast Television Channels

c. Television broadcast signals proposed for part-time carriage.

Network Affiliation*	City	Call Letters	Broadcast Channel	Cable Channel	Proposed Activation Date

* e.g., late-night only, syndicated program black-out time, network fill-in.

Form V-D

Proposed Signal Carriage and Channel Allocations

Service Tier No. ___ (if applicable)

2. Nonbroadcast Channels (does not include pay cable services).

a. Automated Programming (e.g., time, weather, news, sic-scan news, sports, stockmarket, etc.)

Service	Source	Cable Channel	Hours Per Day (est.)	Proposed Activation Date*

*Specify proposed activation date if other than initial date.

Form V-E

Proposed Signal Carriage and Channel Allocations

Service Tier No. ___ (if applicable)

2. Nonbroadcast Channels (does not include pay cable services).

a. Nonautomated Programming.

(1) Received Via Satellite.

Service	Source	Cable Channel	Hours Per Day (est.)	Proposed Activation Date*

* Specify proposed activation date if other than initial date.

Form V-F

Proposed Signal Carriage and Channel Allocations (cont'd.)

Service Tier No. ___ (if applicable)

2. Nonbroadcast Channels (does not include pay cable services).

b. Nonautomated Programming.

(2) System originated programming (not via satellite) includes programming locally produced purchased, leased or obtained from other sources (excluding access).

Service	Source	Cable Channel	Hours Per Day (est.)	Proposed Activation Date*

* Specify proposed activation date if other than initial date.

Form V-G

Proposed Signal Carriage and Allocations (cont'd.)

Service Tier No. ___ (if applicable)

2. Nonbroadcast Channels

c. Designated Access Channels (channels set aside for non-operator-originated local programming)

Type*	Cable Channel	Hours Per Day Available	Proposed Activation Date**

* e.g., public, local government, educational, leased, composite (list composite uses), or any other specific allocation contemplated.

** Specify proposed activation date if other than initial date.

Form V-H

Proposed Signal Carriage and Channel Allocations (cont'd.)

Service Tier No. ___ (if applicable)

3. Pay Cable Service

a. Per channel service.

Type*	Source	Cable Channel	Hours Per Day Available	Proposed Activation Date**

* For example, first-run movies, regional sports, classic movies, etc.

** Specify proposed activation date if other than initial date.

Form V-I

Proposed Signal Carriage and Allocations (con't.)

Service Tier No. ___ (if applicable)

3. Pay Cable Service

b. Per program (if applicable)

Type*	Source	Cable Channel	Hours Per Day Available	Proposed Activation Date**

* For example, first-run movies, regional sports, classic movies, etc.

** Specify proposed activation date if other than initial date.

Form V-J

Summary of Channel Allocations

Service Tier No. ___ (if applicable)

On the chart below briefly describe the designated allocation of each channel on the proposed system (e.g., KXYZ-TV, Ch 7 ABC, 24-hr sports, automated, educational access: Pay TV, etc.) indicate with an asterisk (*) any channel(s) that will not be activated or available initially.

Channel No.	Description of Channel
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	

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41 _____

42 _____

_____

Form V-K

Proposed Signal Carriage and Allocations (cont'd.)

4. Audio service

   a. Broadcast Radio Stations (AM, FM, Shortwave and other frequencies)

      (1) FM broadband ___; or
      (2) individually processed signals ___.

Format*	Hours Per Day (est.)	Proposed Activation Date**	Call Letters	City

_____

* For example, country, rock, etc.

** Specify proposed activation date if other than initial date.

Form V-K
(cont'd)

Proposed Signal Carriage and Allocations (cont'd.)

4. Audio service (continued).

a. Broadcast Radio Stations (AM, FM, Shortwave and other frequencies (continued)

Format*	Hours Per Day (est.)	Proposed Activation Date**	Call Letters	City

* For example, country, rock, etc.

** Specify proposed activation date if other than initial date.

Form V-L

Proposed Signal Carriage and Allocations (cont'd.)

4. Audio service (continued)

b. Nonbroadcast Audio Programming.

Format*	Hours Per Day(est.)	Proposed Activation Date**

* For example, country, rock, etc.

** Specify proposed activation date if other than initial date.

VI. Community Access

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PLAN FOR COMMUNITY AND INSTITUTIONAL ACCESS	Form VI-A
ACCESS CHANNELS AND ADMINISTRATION	Form VI-B
ACCESS PRODUCTION EQUIPMENT AND FACILITIES	Form VI-C
COMMUNITY ACCESS TRAINING	Form VI-D
SUPPORT FOR ST. PAUL COMMUNITY ACCESS CORPORATION (SPCAC)	Form VI-E
SUPPORT FOR ST. PAUL INSTITUTIONAL ACCESS CORPORATION (SICAC)	Form VI-F
COMMITMENT TO ACCESS PROGRAMMING	Form VI-G
PLAN FOR THE USE OF LOCAL RESOURCES	Form VI-H

Form VI-A

PLAN FOR COMMUNITY AND INSTITUTIONAL ACCESS

The City of St. Paul has expressed the desire to include community and institutional access as a significant element of its cable system. Applicants are required to describe in detail their overall commitment to access programming, including the number and nature of channels (whether the channels will be on "tiered" services, etc.). Applicants also are required to make commitments which will provide at various locations in the City, facilities (access centers) where persons desiring to produce access programming can (1) meet, (2) receive instruction

on the use of equipment, (3) make use of quality studio equipment to produce access programs, (4) borrow or otherwise obtain the use of portable equipment, and (5) transmit programs into the system for system-wide viewing and/or viewing through portions of the system. Applicants are directed to carefully review Section 1.15 of this document which contain a more detailed description of the City's requirements for access.

> Describe, in a detailed narrative, the applicant's plan for providing community access including all access facilities (studios, access centers, equipment, etc.) required to support that concept.

Form VI-B

ACCESS CHANNELS AND ADMINISTRATION

Applicant is to attach a set of recommendations regarding the rules and procedures which SPCAC and SPIAC should consider for the operation of public, educational, government and leased access channels. The rules must describe:

- availability of channels to various users;
- availability of equipment and rules governing the use of equipment;
- scheduling procedures for reserving equipment and channel time;
- any rates to be charged, including deposits;

- copies of contract forms and application forms;
- availability of production assistance, etc.; and
- policy for adding additional channels as the current allocation becomes fully utilized.

Form VI-C

ACCESS PRODUCTION EQUIPMENT AND FACILITIES

Please describe facilities and equipment, if any, that will be available to access channel users on an exclusive or priority basis. Do not include local origination equipment listed on Form VII-C.

Access Studios:

– Locations (approx.):

– Size (approx.):

Access Equipment

– Equipment

---

* It will be presumed that equipment described or its equivalent will be provided.

Form VI-D

COMMUNITY ACCESS TRAINING

Does the applicant propose to provide training classes for volunteers and other users of access services? [ ] Yes [ ] No

If "yes," specify the curriculum, schedules and locations for training programs and lists (if any) to the trainees and describe what remedies will be available to the City in the event of the applicant's default in its promise to so provide the training.

Form VI-E

SUPPORT FOR ST. PAUL COMMUNITY ACCESS CORPORATION (SPCAC)

The City intends to create the St. Paul Community Access Corporation (SPCAC) to have primary responsibility for the promotion and development of non-discriminatory community access on a first-come, first-serve basis throughout the City. As a part of its overall commitment to the support of community access, the applicant should describe its proposal for initial and ongoing funding, channels, facilities, and other support to the SPCAC.

Form VI-F

SUPPORT FOR ST. PAUL INSTITUTIONAL ACCESS CORPORATION (SPIAC)

The City intends to create the St. Paul Institutional Access Corporation (SPIAC) which will have primary

responsibility for the development and management of cable access resources for the benefit of institutions in the City of St. Paul. As a part of its overall commitment to the support of institutional access, each applicant should describe its proposal for initial and ongoing funding, channels, facilities, and other support to the SPIAC.

Form VI-G

COMMITMENT TO ACCESS PROGRAMMING

1. Operating Budget (include only salaries, benefits, maintenance of production equipment, tape and film stock, miscellaneous supplies and promotion):

First Year	$_____
Third Year	$_____
Fifth Year	$_____
Tenth Year	$_____
Total over Fifteen Years	$_____

2. Staff Commitment:

	Full-Time	Part-Time
First Year	____	____
Third Year	____	____
Fifth Year	____	____
Tenth Year	____	____

3. How many part-time positions equal one full person year? _____

4. Discuss access programming philosophy, specifically describing plans and objectives for access. Include names of organizations and individuals contacted by the applicant to assess local needs and desires.

MINORITY PROGRAMMING

Describe plans for-funding, production and transmission of minority programming, and plans for involving minorities in research and decisionmaking in local programming.

(Minority programming is programming that is "by and about" minorities and is sensitive to the values, needs and concerns of the particular minority group whose perspective the program is intended to reflect. With the exception of linguistic programming, it should not necessarily be perceived as "for minorities only," in that programming oriented toward a specific target audience may well have a broader audience appeal. Furthermore, a minority program is a program that closely reflects the social, economic and cultural experience and perspective of a minority group, and focuses on a need or an interest of the specific minority group with which the program identifies.)

Form VI-H

PLAN FOR THE USE OF LOCAL RESOURCES

Applicants are encouraged to consider the use of existing local resources in the development of their plans for community and institutional access. A variety of possible arrangements should be considered regarding the use of existing local production facilities and talent. At a minimum, applicants are required to submit detailed information regarding their plans to use local resources, facilities, staff, and production capability.

VII. Local Origination Programming

Table of Contents

PLAN FOR LOCAL ORIGINATION PROGRAMMING — Form VII-A

LOCAL PROGRAM PRODUCTION EQUIPMENT AND FACILITIES — Form VII-B

COMMITMENT TO LOCAL ORIGINATION PROGRAMMING — Form VII-C

PLAN FOR THE USE OF LOCAL RESOURCES — Form VII-D

Form VII-A

PLAN FOR LOCAL ORIGINATION PROGRAMMING

It is the City's hope that cable will serve as a vehicle for sharing St. Paul's cultural, educational and artistic resources with local residents. Therefore, we view the applicants' local origination proposals with great interest,

and encourage applicants to provide creative and imaginative programing and services.

> Describe the applicant's overall plan for providing local origination programming and services, including: proposed schedule for implementation; hours or service per week at the inception of the license, after 5 years and after 10 years; and the dollar figure to be provided for start-up and yearly operations over the life of the license.

Form VII-B

LOCAL PROGRAM PRODUCTION EQUIPMENT AND FACILITIES

Applicants should list all studio facilities and equipment which will be provided for local program production. Although facilities may be available to all classes of users, please note that access studios and equipment (listed on Form VI-C) are for priority use of access channel users, and should exclude any facilities or equipment listed on this page.

Please indicate location of production facilities and list make, model number and your approximate cost for each piece or grouping of equipment.

Local Origination Studio:

- Location (approx.):

– Size (approx.):

– Will this facility also serve as an access studio? [ ] Yes [ ] No

Local Origination Equipment List (provide make and model number*). Do *not* include equipment available to access channel users on an exclusive or priority basis.

---

* It will be presumed that equipment described or its equivalent will be provided. As an alternative, applicant may provide detailed specifications for such equipment.

Form VII-C

COMMITMENT TO LOCAL ORIGINATION PROGRAMMING

1. Operating Budget (include only salaries, benefits, maintenance of production equipment, tape and film stock, miscellaneous supplies and promotion):

First Year	$_____
Third Year	$_____
Fifth Year	$_____
Tenth Year	$_____
Total over Fifteen Years	$_____

2. Staff Commitment:

	Full-Time	Part-Time
First Year	____	____
Third Year	____	____
Fifth Year	____	____
Tenth Year	____	____

3. How many part-time positions equal one full person year? _____

4. Approximately how many hours per week of local origination programming will be presented by system operator? Do not include automated programming, access programing or programming received via satellite. Also, do not include repeat showings of a particular program.

   - Programming produced locally by operator _____ hrs/week
   - Programming obtained from other sources _____ hrs/week

   Total _____ hrs/week

5. Discuss local programming philosophy, specifically describing plans and objectives for local origination. Include names of organizations and individuals contacted by the applicant to assess local needs and desires.

Form IX-H

INSTITUTIONAL DROPS

The City requests that a cable drop and outlet be provided at no cost to all public schools, police and fire stations, public libraries, and public buildings listed in Appendix B. List all institutions to be served and indicate the timetable for providing service to each. Indicate which institutions will receive free drops for both the institutional and subscriber networks. Indicate which drops include free service.

Form VII-D

PLAN FOR THE USE OF LOCAL RESOURCES

Applicants are encouraged to consider the use of existing local resources in the development of their plans for local origination programming. A variety of possible arrangements should be considered regarding the use of existing local production facilities and talent, including the lease and upgrade of existing facilities, contracts with existing production facilities for the development of a specific amount or type of programming, and/or the purchase of programming from local independent producers and other local sources. At a minimum, applicants are required to submit detailed information regarding their plans to use local resources, facilities, staff, and production capability.

The City also encourages applicants to consider the involvement of local institutions and businesses in their plans to develop advanced cable communications services, both as service providers and in terms of research and development.

VIII. Home Interactive Services

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EXPERIENCE AND CAPABILITY – HOME INTERACTIVE SERVICES	Form VIII-A
HOME INTERACTIVE SERVICE PLAN	Form VIII-B
COMPUTER COMMUNICATIONS SERVICES	Form VIII-C
RATES AND CHANGES	Form VIII-D
RESEARCH AND DEVELOPMENT	Form VIII-E
SERVICE ASCERTAINMENT	Form VIII-F
HOME SECURITY SERVICES	Form VIII-G
PLAN FOR THE USE OF LOCAL RESOURCES	Form VIII-H

VIII. Home Interactive Services

The City of St. Paul seeks a cable system whose management and design is capable of allowing subscribers to gain a full and ongoing advantage from technical advancements in cable communications in the area of developing home interactive services.

The City is interested in participating in the development of public service applications of these services, especially those which may affect the functioning of City departments such as police, fire, emergency medical, water, electric, etc. Applicants are encouraged to present plans to initiate pilot projects and other activities to involve the City in the successful development of these services.

The City cautions applicants to provide realistic assessments of the timetables, costs, research and development requirements, and proposed beyond those technical limitations of any services traditionally offered. Applicants should indicate specifically whether this is a commitment or an expectation, and if the former, what specific steps will be taken to develop and market such services.

The equipment specified by the applicant to provide these services should be described and defined in the technical section of this RFP, and all costs and revenue projections associated with the offer of these services should be presented in the financial section of the RFP.

Form VIII-A

EXPERIENCE AND CAPABILITY –
HOME INTERACTIVE SERVICES

Provide the following information:

1. Total number of systems now in operation providing home interactive service: _____
   Number of subscribers: _____

Type of services:

Type of equipment:

2. Total number of systems not yet in operation, but for which interactive service will be provided in the next two years: _____
List each system and anticipated service dates. (Use additional space if necessary.)

3. Indicate any special capability of applicant to provide home interactive services. Such capability could include cooperation with another firm that has specialized expertise. (Use additional space if necessary.)

Form VIII-B

HOME INTERACTIVE SERVICE PLAN

Applicants should describe their plans for offering any or all of the following services, including the timetable for implementation, and an analysis of eventual benefits or returns on the investment in this service.

- Subscriber polling
- Teletext
- Viewdata
- Security & alarm functions
- Computer-assisted instruction
- Entertainment and video games
- Consumer financial or shopping services

- Meter reading or energy management
- Electronic mail (voice & character) services for business and home subscribers
- Entry modes to multiple data bases and computer services
- Communications for home computers
- Other services

Form VIII-C

COMPUTER COMMUNICATIONS SERVICES

The City has placed a priority on the use of the cable system for computer communications services. The City requires that applicants allocate a minimum of one upstream and downstream 6 MHz channel on the subscriber network for computer communications and a system design that will accommodate data speeds of up to 19.2 Kbps on either the residential or institutional network. Applicants should clearly indicate what number of simultaneous home computer users can be accommodated upon system activation and present a plan to increase that capacity to meet future needs. In addition, applicants are encouraged to provide units to interface with home terminals that have RS232 and/or RS449 or equivalent inputs to accommodate home computer users.

Applicants should describe fully their plans for the interconnection of home computers on the subscriber network.

Form VIII-D

RATES AND CHARGES

1. Explain the derivation of the rate structure for each type of home interactive service to be offered. Discuss any differences in the rates proposed for various types of subscribers.

2. Will there be an initial demonstration period in which no charges will be applied? [ ] Yes [ ] No

   If "yes," for how long and under what conditions?

Form VIII-E

RESEARCH AND DEVELOPMENT

Describe research and development plans for creating new services in the future including financial provisions for these efforts. (Use additional space if necessary.)

Form VIII-F

SERVICE ASCERTAINMENT

List the names of any individuals or organizations with whom the applicant has consulted regarding the possibility and desirability of delivering such services. (Use additional space if necessary.)

Form VIII-G

HOME SECURITY SERVICES

If security or alarm functions are proposed, what procedures will be used to protect police and fire departments from excessive false alarms?

Form VIII-H

PLAN FOR THE USE OF LOCAL RESOURCES

Applicants are encouraged to consider the use of existing local resources in the development of their plans for home interactive services. A variety of possible arrangements should be considered regarding the use of local institutions and businesses in their plans to develop advanced cable communications services, both as service providers and in terms of research and development. At a minimum, applicants are required to submit detailed information regarding their plans to use local resources, including documentation of any agreements made with local institutions or businesses.

IX. Institutional Network

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EXPERIENCE AND CAPABILITY	Form IX-A
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NEEDS ASSESSMENT	Form IX-C
RESPONSE TO INSTITUTIONAL NEEDS	Form IX-D
COMMITMENT TO INSTITUTIONAL SERVICES	Form IX-E
MARKETING PLAN	Form IX-F
RATES AND CHARGES	Form IX-G
INSTITUTIONAL DROPS	Form IX-H
PLAN FOR THE USE OF LOCAL RESOURCES	Form IX-I

IX. Institutional Network

The City is seeking proposals offering a separate institutional network which would be developed simultaneously with the subscriber network. The desired system should be capable of interconnection with the subscriber network, and should have the capability to carry two-way video (wide band and slow scan) and audio information, interactive digital computer data and text information. While a long term goal is that the institutional network become self-supporting and independent of subscriber revenues, it is recognized that such a network must be subsidized for an initial development period.

The City encourages applicants to propose a plan for utilizing the institutional network to achieve maximum benefits to the community over the life of the franchise. The City has designated the St. Paul Institutional Access Corporation (SPIAC) to have primary responsibility for the development and management of access to the cable system for the benefit of institutions in the City of St. Paul. Applicants should propose a role for SPIAC in the administration of access to the institutional network. In addition, a broad range of public sector agencies should be encouraged to experiment with institutional service through the offer of free drops and other incentives.

Form IX-A

EXPERIENCE AND CAPABILITY – INSTITUTIONAL NETWORK SERVICES

The City is interested in learning about applicants' experience with both institutions in general and specifically with separate institutional networks. Applicants should clearly discuss each of these two concepts.

Provide the following information. (Use additional space when necessary.)

1. Total number of systems in operation providing institutional service: _____
   Describe type of service provided and institutions* utilizing service.

   Describe any services specifically used by municipal government agencies.

2. Total number of systems not yet in operation, but for which the institutional service will be provided in the next two years:

   _____

   Describe the system design and services for each.

3. Indicate any special capability of applicant to provide institutional services. Such capability could include cooperation with another firm that has specialized expertise.

---

*In the forms concerning institutional services, the word – institution – should be read broadly to cover all public, nonprofit, and commercial users, unless the context indicates otherwise.

Form IX-B

STATEMENT OF INTENT

Will the applicant provide a dedicated institutional network? [ ] Yes [ ] No

If the answer is "no," what alternative do you recommend that will provide the same level of service?

If the answer is "yes," present the overall plan for the proposed institutional network. (Use additional pages if necessary.)

Form IX-C

NEEDS ASSESSMENT

Concisely describe how the government, business and institutional needs were assessed for the City of St. Paul, including the methodology for collecting and analyzing needs assessment data.

(Please provide samples of survey instruments used, summary of analyses, list of contacted government, institutional and community representatives and other data.)

Form IX-D

RESPONSE TO INSTITUTIONAL NEEDS

Present an analysis of the most critical communications needs of public agencies, institutions and businesses that can be met by the institutional network, and specifically how the needs could be addressed by the institutional services proposed by applicant.

Form IX-E

COMMITMENT TO INSTITUTIONAL SERVICES

Describe the specific commitments proposed by applicant to meet the needs described and the public benefits that are expected as a result. In particular, describe the potential long-range benefits in cost savings and/or improvements in effectiveness. The City encourages only commitments that have shown in the utilization plan to be potentially cost-effective.

The commitments described should include:

- facilities, physical and personnel resources;
- marketing, pilot tests, and/or service development efforts, specifically including the service development efforts proposed to encourage use of the service to be offered; and
- application of commitments to each category of service, and each public user group.

Form IX-F

MARKETING PLAN

Describe marketing plans for institutional service including plans for ensuring that the institutional network will eventually become self-supporting.

Form IX-G

RATES AND CHARGES

1. Explain the derivation of the rate structure for the use of various services on the institutional network. Discuss any differences in the rates proposed for public, non-profit, and commercial institutions.

2. Will there be an initial demonstration period in which no charges will be applied for use of the institutional network?

[ ] Yes [ ] No

If "yes," for how long and under what conditions?

Form IX-I

PLAN FOR THE USE OF LOCAL RESOURCES

Applicants are encouraged to consider the use of existing local resources in the development of their plans for institutional network services. A variety of possible arrangements should be considered regarding the use of local institutions and businesses in their plans to develop advanced cable communications services, both as service providers and in terms of research and development. At a minimum, applicants are required to submit detailed information regarding their plans to use local resources, including documentation of any agreements made with local institutions or businesses.

Form X. Municipal Services

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MUNICIPAL USE OF THE SUBSCRIBER NETWORK	Form X-B
MUNICIPAL USE OF THE HOME INTERACTIVE SERVICES	Form X-C
MUNICIPAL USE OF THE INSTITUTIONAL NETWORK	Form X-D

Municipal Services

The City has placed a high priority on the development of cable communications services which will contribute to the overall efficiency and cost-effectiveness of City and other government services. A Citywide Cable Task Force has been appointed by the Mayor to investigate the applications of cable technology to City government operations and staff activities. This Task Force has prepared a report on the municipal uses of cable television. This report should provide applicants with fundamental information and recommendations regarding the City's use of the cable system.

Applicants are encouraged to supplement this information by conducting their own assessments of the City's communications needs. The City Council has recently adopted a resolution regarding contact between applicants and be followed in conducting needs assessments of City government departments. The needs of other government agencies should also be assessed in this context,

and the City has not adopted any policies regarding applicant communication with other government officials.

Form X-A

MUNICIPAL NEEDS ASSESSMENT

Concisely describe how the communications needs of the City of St. Paul were assessed, including the methodology for collecting and analyzing needs assessment data.

(Please provide samples of survey instruments used, summary of analyses, list of contacted City representatives and other data.)

Form X-B

MUNICIPAL USE OF THE SUBSCRIBER NETWORK

The City is interested in the use of the subscriber network to distribute information to the public, in both alphanumeric and full video formats. Applicants are required to provide a minimum of one upstream and one downstream video channel on the subscriber network for government access. The City encourages applicants to exceed this minimum requirement, and present an overall plan for municipal government use of the subscriber network. This plan should include channel allocations. access to production facilities, staff and financial support required for the City to obtain maximum benefits from the development of cable communications in St. Paul.

Form X-C

MUNICIPAL USE OF THE HOME INTERACTIVE SERVICES

The City is interested in playing a significant role in the development of public service applications of home interactive services, especially those which may affect the functioning of City departments (such as police, fire, emergency medical, water, electric, etc.). Applicants are encouraged to present plans to initiate pilot projects and other activities to involve the City in the cost-effective delivery of these services.

Form X-D

MUNICIPAL USE OF THE INSTITUTIONAL NETWORK

The City expects that significant cost savings can be realized through the municipal use of the institutional network to carry out a variety of communications functions. Applicants are required to provide a minimum of one upstream and one downstream video channel on the institutional network for government access. The City encourages applicants to exceed this minimum requirement, and present an overall plan for municipal government use of the institutional network. The institutional network plan should also include provisions for municipal and other government telecommunications services including voice and data communication.

1. Specify the bandwidth and facilities which will be allocated to municipal and government use, as well as the terms and rates for municipal telecommunications services. The emphasis here should be on cost-effective

applications of institutional network services which will result in cost savings for the City.

2. Describe any provisions for assistance (resources and equipment, financing plans, etc.) to be offered to the City as it develops municipal plans for innovative and potentially cost-saving technologies, such as remote computerized traffic control signals; centralized energy management of municipal buildings; information exchange between City offices and constituents.

XI. Financial Resources and Commitments

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FINANCIAL RESOURCES	Form XI-A
COMMITMENT TO REBUILD EXISTING SYSTEMS	Form XI-B
NEW BUILDING COMMITMENTS	Form XI-C
POTENTIAL BUILDING COMMITMENTS	Form XI-D

Form XI-A

FINANCIAL RESOURCES

Please describe in detail the financing plan for the construction and operation of the proposed City of St. Paul cable communications system. Proof of financial capability shall include the following:

1. Source of financing:
   a. Equity – What is the source and amount of equity capital?
   b. Primary Debt – What is the primary source and amount of debt?

c. Secondary Debt – What is the secondary source and amount of debt?

2. Terms of financing:

a. Amount – Primary $ ___ Period ___

Amount – Secondary $ ___ Period ___

b. Under what conditions is the financing to be made available?

c. What interest rates? ___

d. What collateral is involved? ___

e. Who are the guarantors? ___

f. Are there related agreements made in connection with financing of this project?

g. Are there any limitations on the sale of stock by individual holders in this project? Describe.

h. Are there any buy-out or buy-back stock provisions? Describe.

i. Are there any assignments or intended assignments of stock voting rights? If so, describe.

j. If applicant is (or includes) a multiple system operator, will it agree to countersign the franchise agreement if asked by the City?

k. Is applicant organized as an IRS Subchapter S corporation? If yes, what depreciation rate will be used for tax purposes?

3. Documentation: Supply correspondence that assures applicant's financial viability, such as letters of commitment from financial institutions, which will demonstrate the availability of sufficient funds to complete the construction of the City of St. Paul cable communications system.

If applicant is a multiple system operator, give evidence of the portion of the company's line of credit that is presently uncommitted and will be applied to the construction of the City of St. Paul system.

If local investors are involved, list the amount of equity contribution of each, plus the method by which the contribution is paid (e.g., cash, cash plus credit, services, etc.). Include financial commitment documentation for each investor.

If applicant is a division or a subsidiary of an MSO, provide the proposed debt instrument describing terms of payment.

If capital is to be raised by a parent company, provide report for the parent company.

Form XI-B

COMMITMENT TO REBUILD EXITING SYSTEMS

To be completed by all applicants franchised in other communities.

Miles of committed rebuilding					Committed total capital costs
Rebuilding Plant	Year 1	Year 2	Year 3	Year 4	Year 5
Community Name ( )	Miles				
	Cost				
Community Name ( )	Miles				
	Cost				
Community Name ( )	Miles				
	Cost				
Community Name ( )	Miles				
	Cost				
Community Name ( )	Miles				
	Cost				

Community Name ( )	Miles Cost
Community Name ( )	Miles Cost
Community Name ( )	Miles Cost
Community Name ( )	Miles Cost
Community Name ( )	Miles Cost
Community Name ( )	Miles Cost
Community Name ( )	Miles Cost
Community Name ( )	Miles Cost

Community Name	Miles				
( )	Cost				
Community Name	Miles				
( )	Cost				
TOTALS	Year 1	Year 2	Year 3	Year 4	Year 5
Rebuild Plant-Miles					
Rebuild Plant Cost					

Form XI-C

NEW BUILDING COMMITMENTS

To be completed by all applicant franchise in other communities.

Miles of committed plant	Committed total capital costs				
New Plant*	Year 1	Year 2	Year 3	Year 4	Year 5
Community Name	Miles				
( )	Cost				
Community Name	Miles				
( )	Cost				

Community Name ( )	Miles Cost
Community Name ( )	Miles Cost
Community Name ( )	Miles Cost
Community Name ( )	Miles Cost
Community Name ( )	Miles Cost
Community Name ( )	Miles Cost
Community Name ( )	Miles Cost
Community Name ( )	Miles Cost

Community Name
( )
Miles
Cost

Community Name
( )
Miles
Cost

TOTALS	Year 1	Year 2	Year 3	Year 4	Year 5
New Plant-Miles					
New Plant Cost					

---

* New plant includes the miles of committed plant and construction costs for all recently awarded franchises which may not have started construction and those other franchises where building program is not complete.

Form XI-D

POTENTIAL BUILDING COMMITMENTS – CURRENT FRANCHISE APPLICATIONS

To be completed by all applicants or parent organizations applying for franchises in other communities. If additional space is needed, please reproduce this form.

Community in which franchise sought	Date of Application	Expected Date of Award	Estimated Plant Mileage	Estimated Cost
Community Name				
Community Name				
Community Name				
Community Name				
		Total Estimated Mileage & Cost		

XII. Financial Pro Forma Projections

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SERVICES PURCHASED FROM PARENT ORGANIZATION Form XII-M

EXPENSES – SUMMARY Form XII-N

FINANCIAL PRO FORMA PROJECTIONS

A copy of Form XII-A should be completed for each level or type of subscriber service to be offered (e.g., for each service tier, pay service, home-interactive service, or other subscriber service proposed by applicant).

Form XII-B should be completed for any additional revenue sources projected by the applicant (e.g., institutional network data services, local advertising, etc.).

For purposes of the financial pro forma, year one begins on the date of MCCB certification. An average annual inflation rate of 7 per cent shall be used in preparing financial projections.

Form XII-A

SUBSCRIBER AND REVENUE PROJECTIONS

YEAR

	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Households passed by cable														
Average subscribers														
Avg. Additional outlets														
Avg. subscribers/ homes passed by cable														
Revenue per subscriber:														
Service														
Additional outlets														
Installation														
Coverter/terminal rental (if billed separately)														
Other (Describe)														
Additional Revenue:														
Service														
Additional Outlet														
Installation														
Other (Describe)														
TOTAL REVENUE FROM THIS SERVICE														

Form XII-B

ADDITIONAL REVENUE PROJECTIONS*

YEAR

	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Advertising sales														
Channel leasing														
Facilities & equipment rental														
Institutional Network Services														
Video Services														
Data Services														
Voice Services														
Installation														
Terminal/Modem Rental														
Other (Describe)														
Other (Describe)														

* List sources separately by category. Applicants must provide rates and charges (See Section XI) for all projected revenue sources.

Form XII-C

SUBSCRIBER AND REVENUE DOCUMENTATION

1. Using the figures of households provided in "Uniform Data" (Appendix C), explain how the subscriber and penetration figures were obtained. In brief narrative, describe the source of any additional information and basis for projection.

2. Describe the basis for the projection of penetration levels. Were any market surveys conducted? If so, how were they conducted? Please furnish copy of market studies.

3. For each source of revenue projected, describe how the yearly revenue figures were obtained. In particular, explain any assumptions that link gross revenues to the rates and charges presented in Section XI (e.g., implied levels of useage).

Form XII-D

INCOME STATEMENT (in 000's)

	YEAR														
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Revenue*															
less operating expenses															
Operating Income															
less interest															
less depreciation															
Pre-tax income															
less income taxes															
plus lose carry forward applied**															
plus investment tax credit applied**															
Net income after tax															
plus depreciation															
Cash Flow															

* Must agree with totals presented on Form(s) XII-A and Form XII-B.

** If applicable. See Form XII-F.

Form XII-E

SOURCES AND USES OF FUNDS (in 000's)

	YEAR														
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Sources of funds															
Beginning cash bal.															
Equity funds															
Loans															
Revenue															
Total															
Uses of funds															
Capital expenditures															
Operating expenses															
Interst payments															
Income taxes															
Loan repayment															
Dividends															
Total															
Avg. loan balance															
Avg. interest rate															

Form XII-F

FINANCIAL PRO FORMA DOCUMENTATION

1. Present, in brief narrative form, applicant's financial goals. Specifically, include in a discussion financial targets for operating income, pre-tax income, and desired return. If Internal Rate of Return (IRR) or Return on Investment (ROI) methods have been used in analyzing this investment and setting financial goals, what is the bsis for rate of return? How was the rate of return calculated? On what investment base? If the discounted cash flow method was used, what items were considered as cash out-flows, in-flows? What residual value was assumed for the system at the end of the franchise period? What cost of capital was used in calculating the net present value? If alternative methods of analysis and goal-setting were employed, please describe them.

2. Please describe how income taxes were computed. Will federal income taxes be consolidated with a parent company? If not, explain treatment of loss carry-forwards and investment tax credits.

Form XII-G

ANTICIPATED CAPITAL EXPENDITURES (in $000's)

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Antenna(s) & tower(s)															
Microwave															
Headend and hubs															
Distribution															
–Aerial															
–Underground															
–Pole arrangments															
Drops & converters: equipment on customer's premises (including capitalized labor)															
Buildings															
–Headend															
–Studio															
–Offices															

NOTE: Include projected replacement capitalization where applicable. Year 1 begins on MCCB

Form XII-G
(cont'd)

ANTICIPATED CAPITAL EXPENDITURES (in $000's)

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Leasehold improvements, furniture, fixtures															
Program origination*															
–Remote mobiles															
–Studios															
–Equipment															

* Must be consistent with totals on Form VI-H, Commitment to Local Origination and Access Programming.

NOTE: Include projected replacement capitalization where applicable. Year 1 begins on MCCB certification.

Form XI-G
(cont'd)

ANTICIPATED CAPITAL EXPENDITURES (in $000's)

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Land															
Test equipment, tools, spare parts & inventory															
Vehicles															
Pre-operating															
Engineering															
Pay-cable related equipment															
Capitalized overhead**															
Institutional network***															
Other****															
TOTAL															

** Discuss and describe the method(s) used in determining capitalized overhead applicable to the system.

*** Must be consistent with total on Form XII-G, Institutional Network Detail.

**** Describe other capital expenditures.

NOTE: Include projected replacement capitalization where applicable. Year 1 begins on MCCB certification.

Form XII-G
(Cont'd)

ANTICIPATED CAPITAL EXPENDITURES (in $000's)
INSTITUTIONAL NETWORK DETAIL

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Antenna(s) & tower(s)															
Microwave															
Headend and hubs															
Distribution															
–Aerial															
–Underground															
–Pole arrangements															
Equipment on customer's premises (including capitalized labor)															
–Drops															
–Converters															
–Modulators															
–Other terminal equipment*															
–Other*															

* Describe other capital expenditures.

NOTE: Include projected replacement capitalization where applicable. Year 1 begins on MCCB certification.

Form XII-G
(cont'd)

ANTICIPATED CAPITAL EXPENDITURES (in $000's)
INSTITUTIONAL NETWORK DETAIL

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Buildings															
–Headend															
–Studio															
–Offices															
Leasehold improvements, furniture, fixtures															
Program origination															
–Remote mobiles															
–Studios															
–Equipment															
Land															
Test equipment, tools, spare parts & inventory															
Vehicles															
Pre-operating															
Engineering															
Capitalized overhead**															
Other***															
TOTAL															

** Discuss and describe the method(s) used in determining capitalized overhead applicable to the system.

*** Describe other capital expenditures.

NOTE: Include projected replacement capitalization where applicable. Year 1 begins on MCCB.

Form XII-H

ESTIMATED CONSTRUCTION COSTS

Item	Aerial	Underground
Distribution Cost Per Mile		
Make Ready	$_____	$_____
Engineering	$_____	$_____
Labor	$_____	$_____
Hardware & Strand	$_____	$_____
Cable	$_____	$_____
Electronics	$_____	$_____
Other	$_____	$_____
Total Cost Per Mile	$_____	$_____
Cost Per Drop – Subscriber Network Drops		
Drop Material	$_____	$_____
Labor	$_____	$_____
Converter	$_____	$_____
Total Cost Per Drop	$_____	$_____
Cost Per Drop – Institutional Network Drops		
Drop Material	$_____	$_____
Labor	$_____	$_____
Terminal Equipment	$_____	$_____
Total Cost Per Drop	$_____	$_____

Please describe the assumptions used in deriving average aerial and underground construction estimates.

If more than one type of converter will be used for subscriber drops, please provide estimates of converter cost and percentage of subscribers for each converter type.

Please detail assumptions regarding terminal equipment, cost and percentage of users for each type of terminal equipment projected.

Form XII-I

DEPRECIATION SCHEDULE (in $000's)

YEAR

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Antenna(s) & tower(s)															
Microwave															
Headend and hubs															
Distribution															
-Aerial															
-Underground															
-Pole arrangements															
Drops															
Converters															
Buildings															
-Headend															
-Studios															
-Offices															
Leasehold improvements															
Origination equipment															
-Remote mobiles															
-Studios															
-Equipment															

Form XII-I
(cont'd)

	YEAR														
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Test equipment, tools, & spare parts															
Vehicles															
Pre-operating															
Engineering															
Pay-cable related equipment															
Capitalized overhead															
Institutional network*															
Other (detail)															
TOTAL															

* Must be consistent with totals shown on Form XII-I, Institutional Network Detail.

Form XII-I

DEPRECIATION SCHEDULE (in $000's)
INSTITUTIONAL NETWORK DETAIL

	YEAR														
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Antenna(s) & tower(s)															
Microwave															
Headend and hubs															
Distribution															
-Aerial															
-Underground															
-Pole arrangements															
Drops															
Converters															
Buildings															
-Headend															
-Studios															
-Offices															
Leasehold improvements															
Origination equipment															
-Remote mobiles															
-Studios															
-Equipment															

Form XII-I
(Cont'd)

DEPRECIATION SCHEDULE (in $000's)

	YEAR														
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Test Equipment, tools, & spare parts															
Vehicles															
Pre-operating															
Engineering															
Capitalized overhead															
Other (detail)															
TOTAL															

* Must be consistent with totals shown on form XII-I, Institutional Network Detail.

Form XII-J

DEPRECIATION JUSTIFICATION SHEET

	Item	Depreciation Life (Years)
1.	Antenna(s) & Towers	
2.	Microwave	
3.	Headend	
4.	Earth Station	
5.	Distribution	
	a. Aerial	
	b. Underground	
	c. Pole arrangement	
6.	Drops	
7.	Converters	
8.	Buildings	
	a. Headends	
	b. Studio	
	c. Offices	
9.	Leasehold improvements, furniture, Fixtures	
10.	Origination equipment	
11.	Test equipment, tools, spare parts, and inventory	
12.	Vehicles	
13.	Pre-operating	
14.	Engineering	

15.	Pay cable converters (and related equipment)	_____
16.	Capitalized payroll	_____
17.	Other (detail)	_____

Form XII-J

DEPRECIATION JUSTIFICATION SHEET
INSTITUTIONAL NETWORK DETAIL

	Item	Depreciation Life (Years)
1.	Antenna(s) & Towers	_____
2.	Microwave	_____
3.	Headend	_____
4.	Earth Station	_____
5.	Distribution	
	a. Aerial	_____
	b. Underground	_____
	c. Pole arrangement	_____
6.	Drops	_____
7.	Subscriber premises equipment	_____
	a. Converters	_____
	b. Other terminal equipment	_____
8.	Buildings	_____
	a. Headends	_____
	b. Studio	_____
	c. Offices	_____

9.	Leasehold improvements, furniture, Fixtures	_____
10.	Origination equipment	_____
11.	Test equipment, tools, spare parts, and inventory	_____
12.	Vehicles	_____
13.	Pre-operating	_____
14.	Engineering	_____
15.	Capitalized payroll	_____
16.	Other (detail)	_____

Form XII-K

PAYROLL EXPENSE

Under each category below, specify actual titles of anticipated personnel (e.g., system manager under General & Administrative; access coordinator under Origination; etc.). In the parentheses ( ), indicate the equivalent number of full-time employees for each category for Years 1, 3, and 5 (e.g., an entry might appear as $97,500 (7)–indicating seven employees receiving a total of $97,500 in that particular year).

ANNUAL SALARIES AND WAGES (in $000s)

Category	Year 3	Year 5	Year 10
A. Plant			
1.	( )	( )	( )
2.	( )	( )	( )
3.	( )	( )	( )
4.	( )	( )	( )
5.	( )	( )	( )
6.	( )	( )	( )
7.	( )	( )	( )
8.	( )	( )	( )
9.	( )	( )	( )
10.	( )	( )	( )
B. Origination			
1.	( )	( )	( )
2.	( )	( )	( )
3.	( )	( )	( )
4.	( )	( )	( )
5._____	( )	( )	( )
6.	( )	( )	( )
7.	( )	( )	( )
8.	( )	( )	( )
9.	( )	( )	( )
10.	( )	( )	( )

C. General & Administrative			
1.	( )	( )	( )
2.	( )	( )	( )
3.	( )	( )	( )
4.	( )	( )	( )
5.	( )	( )	( )
6.	( )	( )	( )
7.	( )	( )	( )
8.	( )	( )	( )
9.	( )	( )	( )
10.	( )	( )	( )
D. Other			
1.	( )	( )	( )
2.	( )	( )	( )

NOTE: Year 1 begins on MCCB certification.

Form XIII-L

EXPENSES – YEARS 3, 5 AND 10 DETAILED PROJECTIONS

Category	Year 3	Year 5	Year 10
A. Plant:			
1. Salaries			
a. Overtime			
2. Employee Benefits			
3. Maintenance (General)			
4. Converter Maintenance			
5. Other Terminal Maintenance			
6. Pole & Site Rentals			
7. Power			
8. Vehicle Expense			
9. Rent			
10. Payroll and Expenses Capitalized			
11. Other*			
TOTAL PLANT			

Please describe all assumptions made to develop operating expenses such as power cost per mile, number of subscribers per general and administrative clerk or technician, leasing cost per vehicle, etc.

* For all "Others" categories of a particular total operating cost, specify the individual components that make up the "other" category and document these expenses.

Form XII-L
(Cont'd)

Category	Year 3	Year 5	Year 10
B. Origination Expenses:			
1. Salaries			
2. Overtime			
3. Benefits			
4. Rent			
5. Maintenance			
6. Vehicle Expenses			
7. Common Carrier (Terrestial)			
8. Local Program Materials			
a. Tape Stock			
b. Film			
c. Misc. Supplies			
9. Satellite Signals+			
a. Independents			
b. Other			
c. Pay Cable			
10. Stand-alone Program Material			
a. Film Service			
b. Other Nonautomated			
c. Automated Programming			

11. Promotion (LO & Access)	_____	_____	_____
12. Other Miscellaneous++	_____	_____	_____

_____

+ List all signals imported and their corresponding annual cost (i.e. WTBS–$___, MSG–$___, UPI–$___).

++ List separately.

Form XII-L
(Cont'd)

Category	Year 3	Year 5	Year 10
C. General, Selling & Administrative Expenses:			
1. Salaries	_____	_____	_____
a. Overtime	_____	_____	_____
2. Benefits	_____	_____	_____
3. Light, Heat & Power	_____	_____	_____
4. Vehicle Expenses	_____	_____	_____
5. Rent	_____	_____	_____
6. Travel & Entertainment	_____	_____	_____
7. Contributions	_____	_____	_____
8. Professional Services	_____	_____	_____
9. Stationary & Supplies	_____	_____	_____
10. Postage & Freight	_____	_____	_____
11. Advertising & Promotion	_____	_____	_____
12. Telephone & Telegraph	_____	_____	_____
13. Sundry Office Expenses	_____	_____	_____

14. Insurance	_____	_____	_____
15. Bad Debt Accounts	_____	_____	_____
16. Start-up Expenses	_____	_____	_____
17. State & Local Taxes	_____	_____	_____
18. Franchise Fees	_____	_____	_____
19. License & Permit Fees (Local)	_____	_____	_____
20. Copyright Payments	_____	_____	_____
21. Service purchased from parent company*	_____	_____	_____
22. Payroll & expenses capitalized	_____	_____	_____
22. Other**	_____	_____	_____

_____

* If applicable, fill in Form XII-M in complete detail.

** For all "other" categories of a particular total operating cost, specify the individual components that make up the "other" category and document these expenses.

NOTE: Year 1 begins on MCCB certification.

Form XII-M

SERVICES PURCHASED FROM PARENT ORGANIZATION
(if applicable)

[Note: if the applicant owns more than one cable system, describe the basis to be used for allocating corporate overhead. For example, perhaps all overhead pool costs are allocated to systems on the basis of a ratio of system subscribers to total company subscribers. From current experience, show total amount of corporate overhead to be shared by all systems.] (Use additional sheets if necessary.)

YEAR

	Preoperating	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Management Services																
Legal																
Accounting																
Customer Billing																
Programming																
Other (Please Detail)																
TOTAL																

Form XII-N

EXPENSES–SUMMARY (in 000s)

YEAR

	Preoperating	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Plant																
Technical Salaries and Benefits																
Other																
Subtotal																

Origination
Program Production Salaries & Benefits
Other
Subtotal
GS&A
Salaries & Benefits
Other
Subtotal
TOTAL

Note: Year 1 begins on MCCB certification.

Form XII-M

SERVICES PURCHASED FROM PARENT ORGANIZATION
(if applicable)

[Note: if the applicant owns more than one cable system, describe the basis to be used for allocating corporate overhead. For example, perhaps all overhead pool costs are allocated to systems on the basis of a ratio of system subscribers to total company subscribers. From current experience, show total amount of corporate overhead to be shared by all systems.] (Use additional sheets if necessary.)

Note: Year 1 begins on MCCB certification.

YEAR

	Preoperating	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Management Services																
Legal																
Accounting																
Customer Billing																
Programming																
Other (Please Detail)																
TOTAL																

XIII. Proposed Rates

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RATES–HOME INTERACTIVE SERVICE	Form XIII-D
RATES–STUDIO AND EQUIPMENT USAGE	Form XIII-E
RATES–INSTITUTIONAL NETWORK SERVICE	Form XIII-F
RATES–OTHER	Form XIII-G

Form XIII-A

PERIOD OF RATE STABILITY

Does applicant guarantee that no changes in any rates will be made until after two years from the date of initially providing cable communications service or when company has completed the first and second years of system construction, whichever is longer? [ ] Yes [ ] No

(BA TO CHANGE)

_____

(Authorized Signature)

If other, please state.

Explain the factor or indicator that might be used in reaching a decision to increase rates for any of the proposed services.

Form XIII-B

RATES - BASIC SERVICE

Rate Schedule: Consideration will be given to applicants with the most reasonable installation and subscriber rate schedule that is at the same time justified in the financial pro forma statements by use of realistic levels of penetration.

List below the initial installation charges and rates for basic services. If more than one tier or service is offered, use a separate sheet for each tier. Explain clearly any combination of basic services provided in each level of basic service (e.g., level 2 includes level 1, etc.)

Note any deposits required, explaining amount, purpose and terms and conditions of such deposits.

Indicate any conditions under which any of the charges described below may be waived or discounted.

Describe any projected rate increases, detailing the factors you considered in planning these increases.

TIER IDENTIFICATION	INSTALLATION CHARGE	MONTHLY RATE
Residential		
First TV Outlet		
Additional TV Outlets, each		
FM (with TV)		
FM (separate)		
Converter* (Deposit $___)**		
Relocation		
Reconnection		
Apartment – Bulk Rate (Describe conditions)		
Commercial		
Government and Educational Facilities		

* Complete if billed separately; describe terms and conditions if lease or purchase options are proposed.

** If deposit is required for converter, state amount and describe conditions relating to ownership, use, repair and replacement.

Form XIII-C

RATES – PAY SERVICE

Detail proposed rates that will be charged for pay cable services. Include charge, if any, for lock-out devices and equipment installation. Indicate whether charges are monthly or assessed on a one-time basis. Also indicate whether charges are on a per-household or per-installation basis. Note any conditions under which any of the charges described may be waived or discounted. Note any difference in rates or service availability that depend upon a subscriber's level of basic service or type of converter.

Form XIII-D

RATES – HOME INTERACTIVE SERVICE

List below proposed rate schedule of home interactive services, indicating type of service, installation, monthly and/or usage rates, unites of charge, and converter/terminal charges for any home interactive services projected on Form X-A. Note any conditions under which any of the charges describe may be waived or discounted.

Form XIII-E

RATES – STUDIO AND EQUIPMENT USAGE

Describe studio and equipment usage rates for commercial and noncommercial users. Include rates for such services as studio production time, remote production time, supervision and instruction, system playback costs,

and editing costs. Note any conditions under which any of the charges described may be waived or discounted.

Form XIII-F

RATES – INSTITUTIONAL NETWORK SERVICE

List below any proposed rate schedule for institutional network including:

a. commercial and noncommercial rates for video, voice and data uses;

b. installation charges;

c. rates for terminal equipment including installation, use, deposits, etc.; and

d. any other rates relating to the institutional networks.

Note any conditions under which any of the charges described may be waived or discounted.

Form XIII-G

RATES – OTHER

Channel Leasing Rates: Please describe the proposed policy for channel leasing. Detail terms and conditions as well as charges for commercial and noncommercial users.

Advertising: Describe all proposed advertising policies and rates.

Other Rates or Policies Not Mentioned Above: Describe rates and/or any charges for any other revenue sources listed on Form XII-B.

XIV. Construction and Service Schedule

Table of Contents

CONSTRUCTION SCHEDULE AND LINE EXTENSIONS	Form XIV-A
CONSTRUCTION SCHEDULE BY AREA	Form XIV-B
CONSTRUCTION SCHEDULE BY MILEAGE: SUBSCRIBER NETWORK	Form XIV-C
CONSTRUCTION SCHEDULE BY MILEAGE: INSTITUTIONAL NETWORK	Form XIV-D
UNDERGROUNDING POLICY	Form XIV-E
CONSTRUCTION PRACTICES	FORM XIV-F

Form XIV-A

CONSTRUCTION SCHEDULE AND LINE EXTENSIONS

Attach an overlay to the map provided indicating the boundaries of the service area to be constructed in each year of construction.* Also state your policy regarding the installation of service drops over 200 feet in length.

NOTE: Year 1 begins with State certification of the franchise.

Form XIV-B

CONSTRUCTION SCHEDULE BY AREA
(SUBSCRIBER NETWORK ONLY)

Referencing the uniform housing data provided by the City, show the proposed schedule of system construction by planning districts.

Year	Planning District Numbers
1	
2	
3	
4	

NOTE: Year 1 begins with State certification of the franchise.

Form XIV-C

CONSTRUCTION SCHEDULE BY MILEAGE
(Subscriber Network Only)

Category	Year 1	Year 2	Year 3	Year 4
a. Aerial plant miles	_____	_____	_____	_____
b. Underground plant miles with conduit	_____	_____	_____	_____
c. Underground plant miles w/o conduit	_____	_____	_____	_____
d. Total plant miles (for year specified)	_____	_____	_____	_____
e. Cumulative plant miles completed (inception to date)	_____	_____	_____	_____
f. Cumulative percentage completed (inception to date)	_____	_____	_____	_____

Total construction period: ___ months from date of franchise grant.

NOTE: Year 1 begins with State certification of the franchise.

Form XIV-D

CONSTRUCTION SCHEDULE BY MILEAGE
(INSTITUTIONAL NETWORK ONLY)

Category	Year 1	Year 2	Year 3	Year 4
a. Aerial plant miles	_____	_____	_____	_____
b. Underground plant miles with conduit	_____	_____	_____	_____
c. Underground plant miles w/o conduit	_____	_____	_____	_____
d. Total plant miles (for year specified)	_____	_____	_____	_____
e. Cumulative plant miles completed (inception to date)	_____	_____	_____	_____
f. Cumulative percentage completed (inception to date)	_____	_____	_____	_____

Total construction period: ___ months from date of franchise grant.

NOTE: Year 1 begins with State certification of the franchise.

From XIV-E

UNDERGROUNDING POLICY

Describe the policy proposed for undergrounding cable when required by the franchising ordinance, including cost-sharing with other utilities and proposed arrangements with residential developers.

Indicate whether any undergrounding with occur where utilities are not undergrounded. Indicate criteria for determining whether underground cable with require conduit, or can be buried directly.

Form XIV-F

CONSTRUCTION PRACTICES

1. System Construction

   a. Will construction by undertaken by turnkey contractor? ( ) Yes ( ) No

   b. If "yes":

      (1) Has turnkey contractor been selected? ( ) Yes ( ) No

      (2) Who is turnkey contractor?

2. Discuss availability of work crews and equipment to ensure compliance with construction schedule. Detail outstanding agreements with construction companies or equipment suppliers. Supply copies of any commitments regarding this particular project.

3. Discuss proposed construction standards dealing with safety and reliability. List construction codes which will be followed.

4. List of discuss standards to be followed regarding tower construction, marking and lighting.

5. Do you have a manual of construction practices to be followed by construction crews? ( ) Yes ( ) No

   If "yes," attach a copy of the manual as an appendix to official record copy of this application. Applicants will be required to make additional copies of the manual available upon City request.

---

*It is expected that the franchisee will submit a copy of the turnkey draft contract to the City prior to execution.

XV. System Design

Table of Contents

PROPOSED SYSTEM DESIGN – SUMMARY	Form XV-A
DISTRIBUTION SYSTEM	From XV-B
HEADEND DESIGN AND SIGNAL SOURCES	From XV-C
SYSTEM INTERCONNECTION	Form XV-D
SERVICE LEVEL SEPARATION	Form XV-E
REGIONAL INTERCONNECT	From XV-F
HOME INTERACTIVE SERVICES	Form XV-G
HOME SECURITY SERVICE	Form XV-H
STATUS MONITORING	Form XV-I
EMERGENCY ALERT SYSTEM	From XV-J
CHANNEL CAPACITY TO & FROM SUBSCRIBERS (SUBSCRIBER NETWORK)	Form XV-K
INSTITUTIONAL NETWORK DESIGN	Form XV-L
EXPANSION CAPABILITY	Form XV-M
TECHNICAL STANDARDS	Form XV-N
SYSTEM MAP AND BLOCK DIAGRAM	Form XV-O

Form XV-A

PROPOSED SYSTEM DESIGN - SUMMARY

Strand Miles

a. Mileage

(1) Subscriber Network - basic subscriber system
Conform to totals on From XIII-C) _____
(a) Single cable? [ ]

or

(b) dual cable? [ ]

(2) Institutional Network
(if separate institutional cable) _____

(3) Other (explain) _____

b. Design Type

Briefly describe the type of layout that will be used to provide to the franchise area. (EXAMPLE: "hub system linked by AML, radial trunk layout using a remote headend interconnected by super trunk, dual-trunk, dual-feeder and separate institutional network, each using 400MHz equipment.") Indicate any use of fiber optics in the system.

Form XV-B

DISTRIBUTION SYSTEM

1. Describe distribution system, cable and equipment. Give manufacturer, type and model number for the following.*

   PLEASE NOTE: If any equipment proposed from use (in this or other sections of Form XV) is not presently available for purchase, this fact must be indicated (e.g., converters in development but not yet available).

Cable:

Aerial

Buried

Drop

Active Electronics:

Trunk Amplifiers

Bridging Stations

Line Extenders

Power Supplies

Standby Power Supplies
Distribution System
Institutional System
Alarm System

Converters

Addressable Taps

Other

Passive Electronics:

Splitters

Power Combiner

Subscriber Taps

Connectors

Other

2. What will be the longest amplifier cascade in the proposed system?

Number of amplifiers: _____
Number of miles: _____
Type of cable: _____

---

*It will be presumed that equipment described or its equivalent will be used in actual construction. As an alternative, applicant may provide detailed specifications for such equipment.

Form XV-C

HEADEND DESIGN AND SIGNAL SOURCES

1. Describe headend design and reception facilities (including make and model numbers of antennas, signal processor, modulators, demodulators and FM processors).* Indicate whether signal studies or measurement programs have been undertaken in selecting the proposed site(s).

a. Will HRC or IRC channelization be used?
[ ] HRC [ ] IRC [ ] No

b. Will common video synchronization be used?
[ ] Yes [ ] No

c. Will individual FM radio signal processing be used?
[ ] Yes [ ] No

2. Describe plans to operate or contract for transmission services using the following bands.

   a. Common Carrier

   b. Cable Television Relay Service (CTRS)

   c. Multipoint Distribution Service (MDS)

   d. Other

3. Describe plans to operate or contract for any satellite earth station(s) including appropriate technical specifications (e.g., size of antenna; manufacturer of antenna; low-noise amplifier make, model number and noise figure; receiver make and model number; standby power; etc.).*

   a. Has frequency coordination study been performed? [ ] Yes [ ] No
   b. Have on-site measurements been made? If "yes," to (a) and/or (b), attach copy(s) as an appendix to this application. [ ] Yes [ ] No
   c. Will earth stations be protected by FCC license? [ ] Yes [ ] No

4. Describe plans for standby power at the headend, hubs and satellite terminal. Give make and model of equipment, as well as time capacity. Indicate whether environmental system(s) (i.e., air conditioning and lighting) are to be powered during standby conditions.*

5. Describe the equipment to be used for programming any automated channels, including make and model numbers.*

---

*It will be presumed that equipment described or its equivalent will be used in actual construction. As an alternative, applicant may provide detailed specifications for such equipment.

Form XV-D

SYSTEM INTERCONNECTION

1. Interconnection between headend and hubs:

Microwave

(a) Describe the type of microwave* and indicate whether spectrum availabities have been determined to support the use of this equipment.

(b) Number of channels:
Downstream ___ Upstream ___

(c) Frequency spectrum: ___MHz

(d) Estimated power: _____
Cable

(a) Describe the size and type of trunk cable (list make and model number).*

(b) List interconnection equipment (amplifiers, etc.), giving modulation technique to be used.

(c) Frequency spectrum:
Downstream ___ channels ___ -MHz

Upstream ___ channels ___ -MHz

(d) Initial activation:

Downstream ___ channels ___ -MHz

Upstream ___ channels ___ -MHz

Other

Describe any other interconnection mechanisms intended to provide either improved performance or better operational flexibility.

---

*It will be presumed that equipment described or its equivalent will be used in actual construction. As an alternative, applicant may provide detailed specifications for such equipment.

Form XV-E

SERVICE LEVEL SEPARATION

1. Will converters be initially provided to all subscribers, for all tiers of basic service?

   [ ] Yes [ ] No

   If "no," explain under what condition converters will be made available.

2. Pay Cable Isolation

   Describe design specifications for the delivery of pay cable television, including methods of security (e.g., negative or positive traps, sync suppression, addressable converters, etc.)

3. Tier Isolation

   If more than one basic service tier is to be provided, describe how lower tier subscribers will be isolated from receiving upper tier programming.

Form XV-F

REGIONAL INTERCONNECTION

Describe plans for interconnection with other broadband telecommunications systems. Include technical plans for interconnection, detailing how the applicant will ensure compatibility with other systems along with details about budgets and channels that will be allocated for interconnection. Indicate any existing agreements that bear on the matter of regional interconnection. Applicants are encouraged to review channel allocations of systems that are adjacent to St. Paul and to place access and other channels in the same locations as on these adjacent systems to facilitate interconnection. Applicants should be familiar with Minnesota Cable Communications Board rules relating to areawide interconnection requirements (4 MCAR Chapter 12 § 4.166 through 4.190).

Form XV-G

HOME INTERACTIVE SERVICES

Describe any headend electronic and/or subscriber terminal equipment* that will be initially installed or offered for immediate installation which will support pay-per-view, energy management, text display, polling or other sophisticated home interactive services. Indicate firm dates for the introduction of any services that are described but which are not to be initially available. Itemize any arrangements made or agreements reached that bear directly on the programming sources and/or data bases/software needed in connection with the optional services described in this section of the application.

The technical plan that you present for home interactive services should complement the development presented in Section VII.

---

*It will be presumed that equipment described or its equivalent will be used in actual construction. As an alternative, applicant may provide detailed specifications for such equipment.

Form XV-H

HOME SECURITY SERVICE

1. If proposed, describe home security service to be installed include make and model numbers).*

2. Will this service be immediately available as each portion of the cable network is activated?

   [ ] Yes [ ] No

   If not, when and on what basis will such service be made available?

3. Will a separate staff be provided to operate the alarm service or will cable service personnel be shared among the operating divisions? Will contract employees be used? Explain.

---

*It will be presumed that equipment described or its equivalent will be used in actual construction. As an alternative, applicant may provide detailed specifications for such equipment.

Form XV-I

STATUS MONITORING

Is status monitoring of system to be employed?

[ ] Yes [ ] No

If "yes," describe, in detail, the status-monitoring system you plan to use.*

---

*It will be presumed that equipment described or its equivalent will be used in actual construction. As an alternative, applicant may provide detailed specifications for such equipment.

Form XV-J

EMERGENCY ALERT SYSTEM

Describe proposed Emergency Alert System including make and model numbers of equipment. Indicate whether system will override all audio and video channels or only audio channels.* Also indicate how the system will be activated and from where.

---

*It will be presumed that equipment described or its equivalent will be used in actual construction. As an alternative, applicant may provide detailed specifications for such equipment.

Form XV-K

CHANNEL CAPACITY TO AND FROM SUBSCRIBERS (SUBSCRIBER NETWORK)*

1. Downstream:
   - (a) Frequency spectrum** ___-MHz
   - (b) Channel capacity ___
   - (c) Channel capacity initially activated ___
2. Upstream:
   - (a) Frequency spectrum** ___-MHz
   - (b) Channel capacity ___
   - (c) Will upstream be initially activated from all subscribers? ___
3. If "no," indicate *when, under what circumstances,* and *how* future capacity will be provided.
   - (a) When and under what circumstances?
   - (b) How?

4. If "yes," please explain. Discuss the channelization scheme proposed for upstream traffic. Also, discuss any provisions made to circumvent unwanted signal ingress ("noise") in the upstream path.

5. Discuss the capacities proposed for both upstream and downstream use in terms of projected service demand. Specifically, does the proposed allocation make adequate allowance for both current downstream demand and potential future upstream demand? How do the allocations relate to the home interactive services proposed by the applicant?

6. Attach a summary spectrum utilization chart for each activated subscriber cable in the proposed system.

---

*It will be presumed that equipment described or its equivalent will be used in actual construction. As an alternative, applicant may provide detailed specifications for such equipment.

**Discuss frequency spectrum and channel capacity, noting in particular any technical barriers that might result in a useable channel capacity below that cited in (b).

Form XV-L

INSTITUTIONAL NETWORK DESIGN

1. Is a separate institutional cable to be constructed or will institutional channels be carried in some other way? Explain. Discuss the advantages of the method that you propose.

2. Channel capacity to and from institutions (Institutional Network).

   Downstream:

   (a) Frequency spectrum ___-MHz

   (b) Channel capacity ___

   (c) Number of channels to be initially activated? ___

Upstream:

(a) Frequency spectrum (per cable) ___-MHz

(b) Channel capacity ___

(c) Channel capacity to be initially activated? ___

3. Attach a summary spectrum utilization chart for each activated institutional cable in the proposed system.

4. Describe, in detail, when, under what circumstances, and how capacity will be provided to institutions. In particular, address the following areas:

- Headend and hub equipment to be installed initially for institutional services. Indicate specifically how video, voice and data communications services will be provided.
- User-premises equipment that will be available initially. Indicate the proposed policy for providing and maintaining specialized terminal and interface equipment.
- Additional equipment that will be installed on a modular basis in the future to increase the range of institutional services.
- Any technical features that ensure information privacy and security.
- Method of providing user access to the Institutional Network, for both transmission and reception capability.
- The plan for network construction and activation including descriptive and explanatory references to any "shadow cable" that is proposed for the institutional network. Will the institutional network trunk routing follow that of the subscriber network?

The technical plan presented for the institutional network should complement the development plan presented in Section VIII.

---

*Discuss frequency spectrum and channel capacity, noting in particular any technical barriers that might result in a useable channel capacity below that cited in (b).

Form XV-M

EXPANSION CAPABILITY

Discuss expansion capability of the subscriber and institutional networks with regard to both the short-term and the long-term, including specific references to the degree of flexibility for adapting the proposed system to increasing or changing capacity requirements.

Form XV-N

TECHNICAL STANDARDS

List the key system technical performance standards which will be met by the proposed cable television system. Include at least carrier-to-noise ratio, composite triple beat and cross modulation specifications. Provide calculations supporting these specifications associated with the following transmission paths.

- Worst-case satellite received signal to furthest subscriber, including distribution system and super trunk effects.
- Worst-case off-air signal to furthest subscriber, including distribution system and super trunk effects.

- Worst-case furthest institutional originator to furthest subscriber, including upstream path, distribution system and longest super trunk effects.

All calculations should be related to full loading of unmodulated television signals. Any enhancements such as HRC channelization, synchronous carriers or FM video modulation must be separately stated and dB improvements individually listed. Also provide substantiation for the cascade numbers used in your calculations.

The applicant certifies and guarantees that these freely offered technical standards that exceed the minimum requirements of FCC are within the financial capability of the proposed system as demonstrated on the pro forma statements and will be delivered to the City of St. Paul cable television system.

Signed: _____

Title: _____

Form XV-O

SYSTEM MAP AND BLOCK DIAGRAM

Attach a map indicating estimated locations of headend, tower and antenna, hubs, studio, microwave facilities and earth station(s), as well as the routing of major trunks.

Attach a headend block diagram showing all major components. Provide separate illustrations for master headend, slave headends, hubs, etc., as may be needed to describe the facilities to be provided.

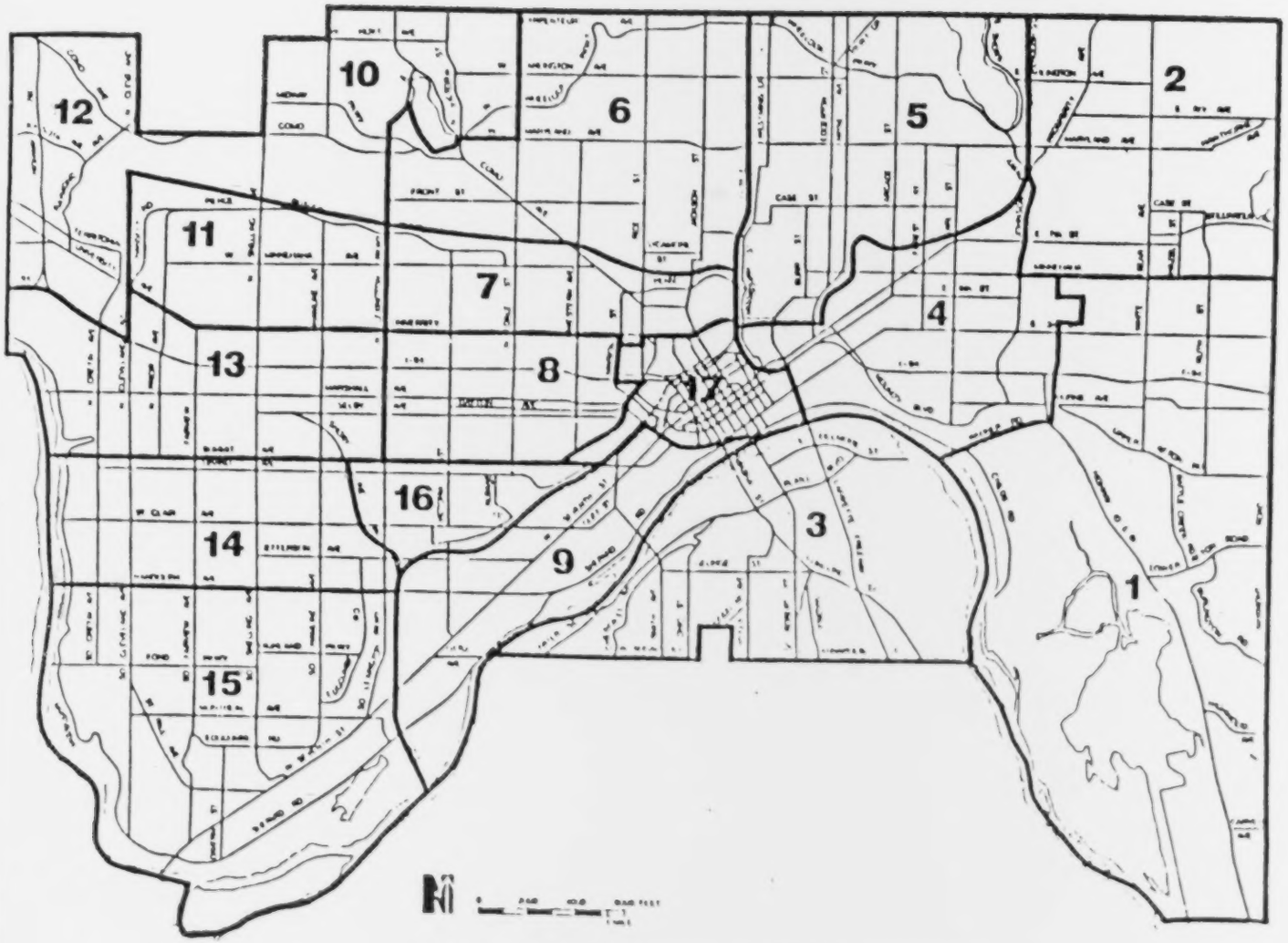
Form XV-P

MISCELLANEOUS

Please briefly summarize any elements of the proposal which have not been adequately covered in other parts of the application forms.

APPENDIX A

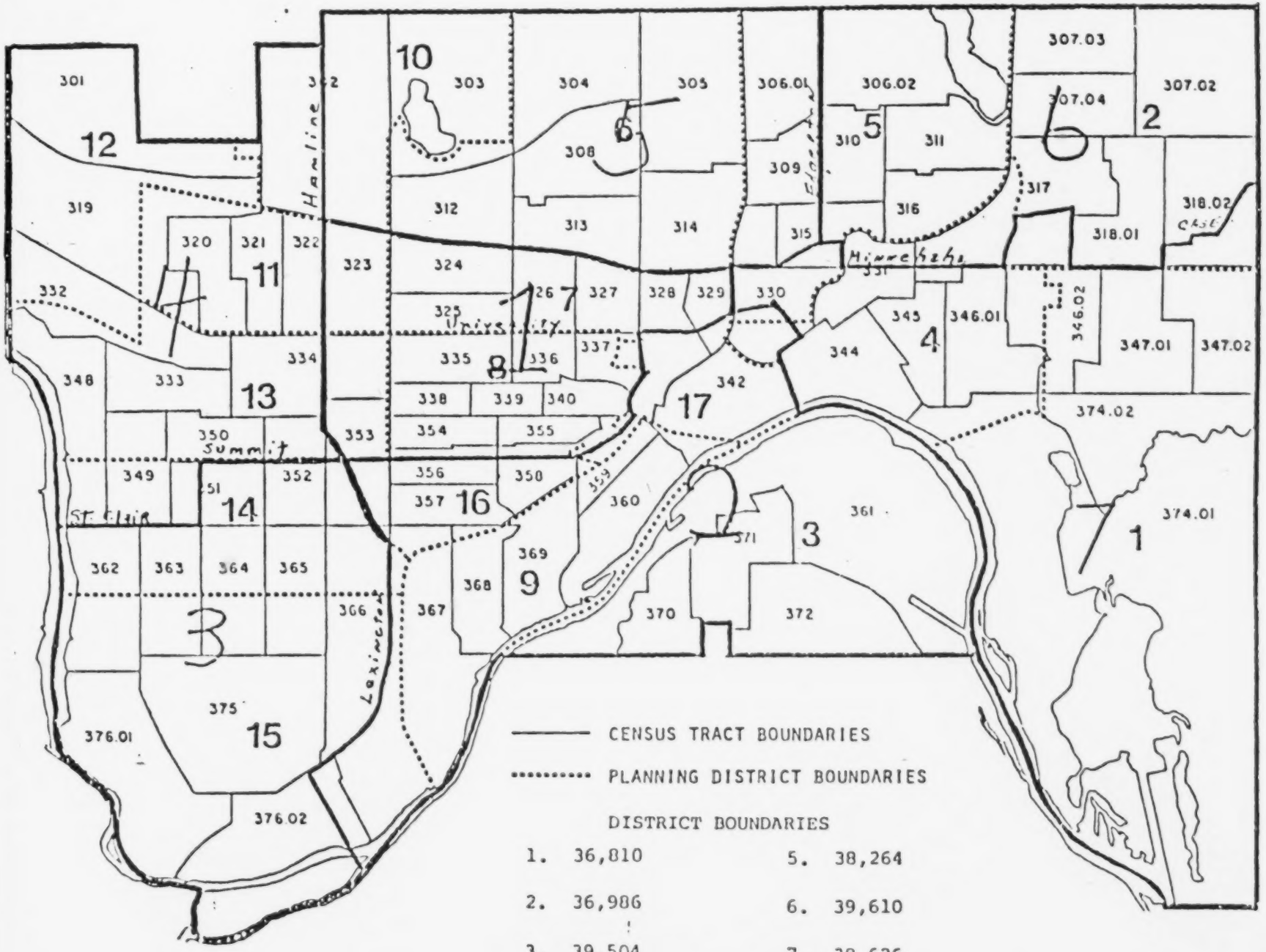
OFFICIAL MAPS



CITIZEN PARTICIPATION PLANNING DISTRICTS

Adopted by Charter Commission October 19, 1981
Filed with City Council October 20, 1981

CENSUS TRACT AND PLANNING DISTRICT BOUNDARIES



——— CENSUS TRACT BOUNDARIES

····· PLANNING DISTRICT BOUNDARIES

DISTRICT BOUNDARIES

1.	36,810	5.	38,264
2.	36,986	6.	39,610
3.	39,504	7.	38,626
4.	40,430		

APPENDIX B

LIST OF BUILDINGS TO RECEIVE FREE DROPS

PUBLIC BUILDINGS
FIRST PRIORITY

City Office Buildings:

City Hall/County Court House 15 W. Kellogg Boulevard	(Public information, data transfer, security, physical systems control, training
City Hall Annex 25 W. 4th St.	("
Public Safety Building 100 E. 10th St.	("
Public Health Center 555 Cedar St.	("
Community Services Dept. – Como Park Office 1224 Lexington Parkway	(Security
Public Works Street Office 873 N. Dale St.	(Date transfer, weather radar)
Public Works Traffic Operations Building 899 N. Dale St.	(Date, transfer, traffic signal control)
Public Works Sewer Building 419 Burgess St.	(Data transfer, monitor pumping stations)
Water Utility Crew Headquarters Shop Highland Parkway & Snelling Ave.	(Data transfer)

Community Services Department – Libraries Division:

St. Paul Central Library 90 W. 4th St.	(Public information, data transfer among branch libraries, physical systems control, security
Branch Libraries	
Riverview 1 E. George St.	("
Rice Street 955 Rice St.	("
Hamline 1558 Minnehaha Ave.	("
St. Anthony Park 2245 Como Ave.	("
Highland Park 1974 Ford Parkway	("
Merriam Park 1831 Marshall Ave.	("
Lexington 1080 University Ave.	("
Arlington Hills 1105 Greenbrier St.	("
Hayden Heights 1435 White Bear Ave.	("
Sun Ray 2105 Wilson Ave.	("
City Garages	
Public Safety Garage 101 E. 10th St.	(Data Transfer)
Municipal Equipment 891 No. Dale St.	(Date Transfer)

Water Utility Garage 277 No. Hamline Ave.	(Control pumping stations)
Community Services Garage 1224 Lexington Parkway	(Data transfer)

Fire Stations

1226 Payne Ave. E.	(Date Transfer, public information, training
273 White Bear Ave. N.	("
1624 Maryland Ave. E.	("
1038 Ross St.	("
754 Randolph Ave.	("
296 W. 7th St.	("
505 Payne Ave.	("
428 Starkey St.	("
860 Ashland Ave.	("
255 Front Ave.	("
2179 University Ave. E.	("
926 Hampden Ave.	("
2530 Edgcumbe Rd.	("
91 No. Snelling Ave.	("
681 University Ave. W.	("
1675 Kasota Ave.	("
1290 No. Snelling Ave.	("

Parks and Recreation Facilities

Como Shop	(Security and temperature control in a few locations
Como Golf Clubhouse	("
Como Park Conservatory	("
Zoo Buildings (All Como Park)	("
Phalen Golf Clubhouse	("
Phalen Park Picnic Pavilion	("

Phalen Park Boat House (All Phalen Park)	("
Highland Park Golf Clubhouse (Highland Park)	("
Highland Park Golf Clubhouse 2051 Edgecumbe	("
Forestry Garage 2051 Edgecumbe Ave.	("
Oxford Pool Lexington & Iglehart	("
Crosby	("
Hidden Falls	("
Battle Creek	("

Police Sector Offices

East Sector 1280 Jackson	
West Sector 558 W. University	
Civic Center 143 W. 4th St.	(Video, data transfer)

Community Centers

Neighborhood House 179 East Robie	(Public Information, security
Martin Luther King 270 North Kent	("
Merriam Park 2000 St. Anthony	("
North End (Capitol Community) 1041 Marion	("
Merrick 715 Edgerton	("

West Seventh 175 Western	(	"
El Rio Vista 179 E. Robie	(	"
Baker Community Center 209 W. Page	(	"
Charles Thompson Memorial Hall 1824 Marshall Ave.	(	"
Thomas-Dale (Wilder Foundation) 911 Lafond	(	"

– In addition, there are some police transmitter sites to be identified by John McCabe.

SECOND PRIORITY

Civil Defense Sirens	(to be supplied soon by John Rukavina)
Mental Health Center 529 Jackson St.	(Data, public information, security)
Municipal Stadium 1000 No. Snelling Ave.	(Security)
Parks and Recreation Facilities:	
Como Pool, Como Park	(Security)
Como Park Maintenance Building, 1306 W. Arlington	("
Phalen Park Golf Maintenance Building, Phalen Park	("
Phalen Park Bath House Building, Phalen Park	("

Highland Park Golf Maintenance Building, 1403 Montreal	(	"
Highland Park Pro Shop, Highland Park	(	"
Highland Park Swimming Building, Highland Park	(	"
Highland Park Pavilion, Highland Park	(	"
Baker, 670 Waseca St.	(	"
El Rio Vista, 179 E. Robie	(	"
Frost Lake, Hazelwood and Idaho	(	"
Groveland, St. Clair and Prior	(	"
Highwood Hills, 2188 Londin Lane	(	"
Homecroft, 1850 Sheridan Ave.	(	"
McDonough, 1544 Timberlake Rd.	(	"
Mounds, 277 Cypress Ave.	(	"
North West Como, 1557 Huron Ave.	(	"
Oxford, 1063 Iglehart Ave.	(	"
St. Clair, 265 Oneida St.	(	"
Valley, 690 Jackson St.	(	"
Rice-Arlington	(	"
Dunning Softball	(	"

Pumping Stations:

Berry & Territorial, 960 Berry	(Monitoring pumping stations	
Brewster, 1100 No. Albert	(	"
Broadway at Kellogg, 302 Broadway	(	"
Childs Road, 2180 Childs Road	(	"
Como and Eustis, 2500 Como at Hendon	(	"

Eagle Station, 205 Eagle St.	(	"
Elway & Montreal, on Montreal	(	"
Glen Terrace, on Glen Terrace	(	"
Jessamine & Mackubin, 1102 Mackubin	(	"
K-Mart, 1691 Kasota	(	"
Parkway Drive, 756 Parkway Drive	(	"
Plato, Plato Blvd. & Robert, 151 E. Plato Blvd.	(	"
Point Douglas, 491 Point Douglas at Lower Afton	(	"
Red Rock (North), 1200 Red Rock Road	(	"
Red Rock (South), 1450 Red Rock Road	(	"
Riverview, 2 E. Starkey	(	"
Robie, 441 Robie at Kansas	(	"
Sherman, 221 Sherman St. at Spring	(	"
Sibley, 279 Sibley at Second	(	"
South Port	(	"
Dog Pound 285 W. Jessamine Ave.	(Security, temperature control)	
Lakeside Pavilion 1339 N. Lexington Parkway	(Security)	
Watergate	(Security)	

OPTIONAL

Parks & Recreation Facilities:

Como Office, Como Park
Harriet Island Pavilion, Harriet Island

Arlington, 665 E. Rose Ave.
Battle Creek, 2076 Upper Afton Road
Belvidere, 291 E. Belvidere
Cayuga, 198 Cayuga St.
Cherokee
Conway Heights, 2090 Conway Ave.
Dayton's Bluff, 790 Conway
Desnoyer, 497 Pelham
Duluth and Case, 1020 Duluth St.
Dunning, Marshall and Griggs
Eastview, 608 Kennard
Edgcumbe, 320 S. Griggs St.
Front, 485 Stinson
Griggs, 1188 Hubbard Ave.
Hamline, 1564 Lafond Ave.
Hayden Heights, 1965 E. Hoyt Ave.
Hazel Park, 919 N. Hazel
Hillcrest, Kenneth and Bohland
Lafayette, 637 Burr St.
Langford, 98 Langford Ave.
Linwood, 860 St. Clair Ave.
Lockwood, 901 E. Cook St.
Margaret, 688 Earl St.
Mounds
Newell, 900 Fairview Ave.
North Dale, 1414 N. St. Albans St.
Orchard, Orchard and Victoria
Palace, 350 View St.
Phalen, 1485 Forest Ave.
Prosperity, 1371 Kennard St.
Riverside, Lexington and Albion
Sackett, 1656 Ames Ave.
Scheffer, 234 Thomas Ave.
So. St. Anthony, Cromwell and Bayless
Sylvan, 77 W. Rose Ave.
West Minnehaha, 694 Charlton
Wilder, 631 N. Albert St.
McMurray

ST. PAUL PUBLIC SCHOOLS, DISTRICT 625
ELEMENTARY SCHOOLS – 1982-83*

Ames
Ames & Case Sts.
774-9731
Thomas Foster, Principal

Battle Creek
Ruth & Upper Afton Rd.
735-0550
Vincent Gorr, Principal

Benjamin Mays
631 N. Albert St.
645-3948
Charmaine Robinson, Principal

Bridge View
360 Colborne St.
293-7635
Charles Burbach, Principal

Bush Memorial
180 South Grotto St.
224-1395
William Tilsner, Principal

Chelsea Heights
Hoyt & Huron Sts.
489-1323
Kenneth Galatowitsch, Principal

Cherokee Heights
694 Charlton
222-6876
Thomas Haas, Principal

Como Park
780 W. Wheelock Pkwy.
488-2593
Kenji Oyanagi, Principal
Ann DeGree, Asst. Principal

Como Park Spec. Prog.
780 W. Wheelock Pkwy.
489-8035
Principal – Same as Como Park

Como Park/Hartzell
780 W. Wheelock Pkwy
489-8035
Principal – Same as Como Park

Daytons Blff
262 Bates Avenue
774-8791
Donald Lackner, Principal

East Consolidated
409 E. Case
772-2477
William Schrankler, Principal
Shirley Pearl, Asst. Principal

East Consolidated/BLC
409 E. Case
772-2477
Principal – Same as above

Eastern Heights
Margaret & Ruth
735-3555
Robert Stolts, Principal

Eisenmenger Learning Center
919 Lafond St.
642-4030
Donald Lieb, Principal

Farnsworth
Arcade & Hyacinth Sts.
776-2791
Hope Lea, Principal

Franklin
Jackson & Valley Sts.
222-5513
Harold Baughman, Principal

Frost Lake
Hazelwood & E. Hoyt
774-6031
Gloria Nozal, Principal

Galtier
Charles & Hamline
646-4854
John Bennett, Principal

Groveland Park
Cleveland & St. Clair
690-1509
Gerald Madigan, Principal

Hancock
Snelling & Hubbard
645-0729
Robert Miller, Principal

Hayden Heights
Hazel & Cle
774-9713
Joanne Ventura, Principal

Highland Park
Saunders & Davern Sts.
698-3865
Shirley Kaiser

Highwood Hills
2188 Londin Lane
735-5912
Joyce Shelton, Principal

Hill
Selby & Oxford
645-0866
John Ashmead, Principal

Homecroft
Edgcumbe & Sheridan
690-1779

Jackson
Edmund & Arundel
227-7897
Kathleen Anderson, Principal

Longfellow
318 Moore
645-3937
Jerald Shannon, Principal

Mann
Eleanor & Kenneth
690-2497
Principal, Peter Grams

Maxfield
St. Anthony & N. Victoria
224-5493
Harlan Balken, Principal

Mississippi
1575 L'Orient St.
488-7253
Alfred Pieper, Principal

Monroe, K-8
810 Palace Ave.
222-0731
Gordon Cherveny, Principal

North End
27 East Geranium
488-7205
Dale Sprigley, Principal

Open School
1023 Osceola Ave.
297-8781
Kenneth Osvold, Principal

Parkway
Bush & Clarence Sts.
774-8781
Anne Rosten, Principal

Phalen Lake
1089 Cypress Sts.
776-1591

Prosperity Heights
Prosperity & E. Ivy
771-8819
Judith Brzinski, Principal

Randolph Heights
Hamline & Jefferson Sts.
William Tilsner, Principal
690-1713

Riverview
Curtice & Woodbury Sts.
227-8369
Delores Henderson, Principal

Roosevelt
Greenwood & Congress Sts.
224-5871
Fenton Horwath, Principal

St. Anthony Park
Knapp & Langford Park Pl.
645-0391
Charles Weldin, Principal

Sheridan
E. Third & White Bear
774-6019
Donald Lieb, Principal

Webster Magnet
707 Holly Avenue
227-8439
Eugene Galatowitsch, Principal

Wheelock
Edgerton & Wheelock Sts.
774-0324
Hope Lea, Principal

Boy's Totem Town
398 Totem Road
735-2880
Stephen Dornbach (Supt.)
Richard Peterson (Asst. Prin.)

ST. PAUL PUBLIC SCHOOLS, DISTRICT 625
SECONDARY SCHOOLS – 1982-83

Central Senior
275 N. Lexington Pkwy
645-9217
John McManus, Principal

Como Park Senior
740 W. Rose Ave.
487-2001
Vern Kenyon, Principal

Harding Senior
1540 E. Sixth St.
776-8533
Donald Ausemus, Principal

Highland Park Junior/Senior
1015 S. Snelling Ave.
690-1545
Eugene Auck, Principal

Humboldt Junior/Senior
30 E. Baker St.
222-3671
Donald Sonsalla, Principal

Johnson Senior
1349 Arcade St.
776-8585
David Frye, Principal

Battle Creek Junior
2121 N. Park Drive
735-4060
Joan Sorenson, Principal

Cleveland Junior
1000 Walsh St.
774-6096
James Bothwell, Principal

Hazel Park Junior
1140 White Bear Ave.
771-5588
Karl Grittner, Principal

Murray Junior
1450 Grantham St.
645-9474
Keith Bergstrom, Principal

Ramsey Junior
1700 Summit Ave.
698-3823
Cy Kaster, Principal

Washington Junior
1041 Marion Street
488-5525
Al Hanner, Principal

Career Study Center
90 South Western
293-0215
Donald Gugisberg, Principal

Open School
1023 Osceola
297-8531
Kenneth Osvold, Principal

ST. PAUL PUBLIC SCHOOLS DISTRICT 625
OTHER FACILITIES

Administration Building
360 Colborne Street

** Central Service Facility
1930 Como Avenue

School Storehouse/School Shop
740 York Ave.

Adams Building
615 South Chatsworth

Gordon Building
1619 Dayton Avenue

Jefferson Building
90 South Western Avenue

Red School House
643 Virginia Avenue

St. Paul Technical Vocational Institute
235 Marshall Avenue

---

* All buildings require drops to the institutional network. Anticipated applications at all locations include:

- distribution of video and text information between and among schools;
- building security;
- energy management;
- and, various types of data transfer.

** This facility requires a drop to both the subscriber and institutional networks.

ARCHDIOCESE SCHOOLS

All require drops to institutional network. It is anticipated that the major use of the system would be for the delivery of video and text information between and among schools.

St. Patrick School
471 E. Magnolia Ave.
776-4420
Sr. John Ellen Rogers, CSJ, Prin.
Rev. Kenan Siegel, Pastor
774-8675

St. Matthew School
10 W. Winifred St.
224-6912
Sr. Pauline Fritz, SSND, Princ.
Rev. Stephen J. Adrian, Pastor
224-9793

St. Peter Claver School
1060 W. Central Ave.
644-9171
Rose Vernell, Principal
Rev. Timothy Kernan, Pastor
646-1797

Holy Spirit School
1406 Randolph Ave.
698-7233
Sr. Geraldine Lane, CSJ, Principal
Rev. Vincent A. Colon, Pastor

St. Andrew School
1028 Van Slyke
489-0304
Sr. Joan Fink, SSND, Principal
Rev. Thaddeus R. Koziol, Pastor
488-6775

St. Columba School
1330 Blair Ave.
644-1807
Thomas Hansen, Principal
Rev. Roger F. Carroll, Pastor
645-9179

St. Bernard School
1167 Albemarle St.
489-8086
Gregory Bartel, Principal
Rev. Burton A. Bloms, OSB, Pastor
488-6733

St. James School
496 View St.
226-2356
Sr. Virginia Biren, SSND, Principal
Rev. William A. Hennen, Pastor
227-7029

Sacred Heart, St. John Consolidated
835 E. 5th St.
776-2763
Sr. Myron Buresh, SSND, Principal
Rev. Charles M. Eggert, Pastor
771-3690

Holy Childhood School
1435 Midway Parkway
644-2791
Sr. Gretta, OSB. Principal
Rev. John Buchanan, Pastor
644-7495

Maternity of Blessed Virgin Mary School
592 W. Arlington
489-1459
Dennis Donovan, Principal
Rev. John G. Donahue, Pastor
489-9347

St. Agnes School
525 Thomas Ave.
227-1886
Robert Ercolanai, Principal
Msgr. Richard Schuler, Pastor
226-5103

St. Casimir School
930 E. Geranium Ave.
776-1549
Barbara Smrdel, Principal
Rev. Norman Pahl, OMI, Pastor
774-0365

St. Francis DeSales School
426 S. Osceola Ave.
225-1230
Judith Bakula, SSND, Principal
Rev. Karl M. Wittman, Pastor
225-3548

Cathedral Consolidated w/ St. Stanislaus
1060 W. Central Ave.
224-5625
Rose Vernell, Principal
Msgr. Ambrose Hayden, Pastor
225-6563

St. Mark School
1983 Dayton Ave.
644-3380
Sr. Jan Dalsin, CSJ. Principal
Rev. John F. Brandes, Pastor
645-5717

St. Luke School
1065 Summit Ave.
224-4839
Cathy Zimmerman, Principal
Rev. Michael Erlander, Pastor
227-7669

Nativity of Our Lord
1900 Stanford Ave.
699-1311
James J. Griesgraber, Principal
Msgr. Clarence J. Steiner, Pastor
698-0309

St. Leo the Great, St. Therese, St. Gregory
2017 Bohland Ave.
690-2477
Ursula Condon, Principal
Rev. John E. Mitchell, Pastor
698-5581

Immaculate Heart of Mary
1550 Summit Ave.
699-7722
James L. Miller, Principal
Rev. Joseph T. Gannon, Pastor
644-8980

Corpus Christi
2131 N. Fairview Ave.
631-0953
Sr. Josine Winter, SSND, Principal
Rev. David McPhee, Pastor
644-0992

St. Pascal Baylon
1770 E. Third St.
776-0092
Sr. Francis Mary Benz, CSJ, Prin.
Rev. James Holl, Pastor
774-1585

St. Adalbert
262 Edmund Ave.
225-7938
Rev. Clarence Zlotkowski, Pastor
225-7938

Blessed Sacrament
1800 Ames Ave.
735-3676
Donald Anderson, Principal
Rev. Donald Tomlinson, Pastor
735-3707

ARCHDIOCESE HIGH SCHOOLS

Cretin High School
495 Hamline Ave. S. 55116
690-2443
Richard A. Kallock, Principal

Derham Hall High School
540 Warwick Ave. S.
St. Paul, Mn. 55116
698-0871
Ronald E. Clubb, Principal

St. Agnes High School
525 Thomas Ave.
St. Paul, Mn. 55103
225-1614
William G. Peper, Principal

St. Bernard's High School
170 W. Rose Ave.
St. Paul, Mn. 55117
488-3753
John O'Neill, Principal

ALSO:

Catholic Education Center
318 W. 6th St.
St. Paul, Mn. 55102
291-4500
Francis Scholtz, Director

PRIVATE SCHOOLS*

Central Lutheran School
775 N. Lexington Parkway

Faith Baptist Christian School
1360 Mississippi

McIntyre Education Center
630 Laurel Avenue

East St. Paul Lutheran School
674 Johnson Parkway

St. John Evan. Lutheran Church
771 Margaret

St. Paul Academy-Summit School
1712 Randolph
Goodrich Campus
1150 Goodrich

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* Institutional network drops for video programming.

APPENDIX C

UNIFORM HOUSING AND DEMOGRAPHIC DATA

CITY OF SAINT PAUL
DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT
DIVISION OF PLANNING
25 West Fourth Street, Saint Paul, Minnesota, 55102
612-298-4151

SEAL
GEORGE LATIMER
MAYOR

DATE: October 4, 1982

TO: Linda Camp, Office of the City Council

FROM: Steve Maack, City Planning Research ACM

RE: City Statistics for Cable Television Request for Proposal

In response to your request, here are the statistics that you will need for the cable television request for proposals.

1. Household data (actually, housing unit data)

– Total number of homes:	110,902	housing units
	110,872	year-round housing units (basis for numbers below)
– # of single family units:	64,838	housing units with 1 units per address (includes some duplex units with separate addresses for each duplex)
	79	mobile homes
	64,917	"single family units"
– # of multiple family units:	22,295	housing units with 2-9 units per address
	23,660	housing units with 10 or more units per address
	45,955	"multi-family units"

Source: 1980 census of population and housing, summary tape file 1

2. Update attached Table I. I have only been able to update information on population and number of dwellings (see attached). The city has not yet acquired infomation from the 1980 census on housing units by bedroom size. The acreage of Planning Districts 9 and 15 will have changed due to a recent boundary change affecting these districts, but the new acreage has not been calculated. I have no special data source on street miles or alley miles since proposed land use surveys for 1981 and 1982 never were implemented due to lack of funding.

3. The St. Paul comprehensive plan states that we should add 10,000 new units to St. Paul by 1990. I have recently projected that 2,173 to 3,230 housing units will be added downtown (census tract 342), on the basis of projects committed or under consideration. Documentation of recommended housing development on currently vacant land is contained in the *St. Paul Housing Development Plan*, available from Marv Bunnell of the Planning and Economic Development Department at $50 per copy (telephone 292-1577, extension 300). If Cable TV companies want further information about vacant land available for housing, they should contact Mr. Bunnell.

TABLE 1. DATA TO BE USED BY APPLICANTS IN PREPARING PROPOSALS

Planning District	Population[1]	Street[2] Miles	Number of Dwellings[1]	1&2 Bedroom[3] Dwellings	3+ Bedroom[3] Dwellings	Acres[4]	Alley Miles
1	19,129	72.4	7,343	2,783	1,267	4,241	9.3
2	25,241	68.3	9,925	7,334	2,689	1,968	30.6
3	14,994	64.7	5,571	4,094	1,251	2,325	9.5
4	15,991	53.7	6,364	4,606	1,640	1,197	17.8
5	25,749	81.8	10,847	7,838	5,198	2,091	38.9
6	23,818	79.4	9,715	5,812	3,308	1,726	25.6
7	13,768	35.2	5,625	4,059	1,303	816	13.0
8	15,799	45.0	6,759	2,994	5,997	711	15.8
9	10,670	39.0	4,592	3,640	1,096	1,294	12.1
10	11,453	41.4	4,588	3,949	975	1,503	13.9
11	12,417	38.3	5,092	3,743	973	838	16.0
12	6,969	37.2	2,786	1,712	1,214	1,952	8.4
13	19,328	49.0	7,512	3,916	2,200	1,125	13.9
14	20,952	52.8	8,441	6,311	1,511	1,100	35.6
15	23,405	82.1	9,988	6,368	3,498	3,149	29.6

Planning District	Population[1]	Street[2] Miles	Number of Dwellings[1]	1&2 Bedroom[3] Dwellings	3+ Bedroom[3] Dwellings	Acres[4]	Alley Miles
16	7,252	18.0	3,688	1,589	1,927	393	9.5
17	3,295	22.0	2,036	31	1,340	373	1.0
ST. PAUL	270,230	880.3	110,872	70,799	37,387	26,802	300.5

---

[1] 1980 census data. Reflects 1982 Planning District boundaries. Housing unit data is for year-round housing units.

[2] 1980 data. Reflects pre-1982 Planning District boundaries.

[3] 1974 data. Reflects pre-1982 Planning District boundaries. Update from 1980 census data summary tape file 3 should be available in late 1982 or early 1983 for 1982 Planning District boundaries.

[4] 1974 data; does not include streets, alleys or public right-of-ways. Reflects pre-1982 Planning District boundaries.

4. Population data

   - Total population: 270,230
   - Non-Hispanic White population: 239,341 (88.57%)
   - Non-Hispanic Black population: 13,099 (4.85%)
   - Hispanic population: 7,864 (2.91%)
   - Non-Hispanic American Indian, Asian or Pacific Islander population: 4,932 (1.83%)
   - Non-Hispanic Others (mostly Hmongs): 4,994 (1.85%)

Source: 1980 census of population and housing, summary tape file 1

- Population by age categories:
  52,538 (19.44%) ages 0 to 14
  85,203 (31.53%) ages 15 to 29
  43,431 (16.07%) ages 30 to 44
  35,820 (13.26%) ages 45 to 59
  34,725 (12.85%) ages 60 to 74
  18,513 (6.85%) ages 75 and over

Source: 1980 census of population and housing, summary tape file 1

- Population by income levels: this data has just become available from the Census Bureau, and has not yet been acquired by the city.

For your information, the census information that I have given here is also available by census tract or by Planning District. Most of the Planning District totals will be contained in a census report to be released in a few weeks. Census tract totals or maps showing percentage distributions on these items can be found in four recent P.E.D.

census reports: *People of Saint Paul, Minorities in Saint Paul, Household Changes in Saint Paul 1970-80,* and *Supply, Demand and Cost of Housing in Saint Paul.* The four census reports can be purchased for $1.00 each from Chuck McGuire of P.E.D. (telephone 292-1577, extension 329).

cc: Chuck McGuire
Allen Lovejoy
Peggy Reichert

APPENDIX D

RESOLUTIONS GOVERNING
CONTACT WITH CARE APPLICANTS
CITY OF SAINT PAUL
COUNCIL RESOLUTION

Council
File NO. ___

Presented By James Scheibel

Referred To _____ Committee: Date _____

Out of Committee By _____ Date _____

WHEREAS, the Council to the City of Saint Paul wishes to protect the public interest and to make the cable communications franchising process fair to all applicants; now, therefore, be it

RESOLVED, That the following rules governing lobbying and financial disclosures during the cable communications franchising process be adopted and remain in effect until the adoption by the Council of a Request for Proposals:

1. Commencing September 1, 1982, and every month thereafter until the adoption of the Request for Proposals, all filings, with the exception of lobbyist registration, shall be made with the City Clerk.

2. All filings shall cover the time period extending from seven days prior to the last reporting date to seven days prior to the current reporting date; however, filings made on September 1, 1982 shall encompass the period extending from August 1, 1982 through August 26, 1982.

3. For the purposes of this resolution, the following definitions shall apply:

a. "Contacts" shall mean any substantive discussions with respect to the cable communications franchising process.

b. "Potential applicants" shall mean those groups or entities, including but not limited to, corporations, associations, partnerships, and cooperatives, which file with the City Clerk a letter of intent through which they express their interest in the cable communications franchising process for the City of Saint Paul. Any group or entity which has such an interest shall file the aforementioned letter of intent.

4. All requests by potential applicants for information from the Cable Communications Staff Task Force and

other City staff shall be through the City's Cable Communications Officer.

5. Council members and their aides and the Cable Communications Officer shall file the following disclosures:

a. A statement of financial interest in a potential applicant or affiliated firm;

b. A statement of any potential conflict of interest arising from professional or personal affiliation;

c. A list of contacts with lobbyists, potential applicants, and their spokespersons.

6. Potential applicants shall file the following information:

a. A letter of intent;

b. Names and address of lobbyists and of persons who will be speaking on its behalf;

c. All transfers or agreements for future transfers of stock options, cash, property or other considerations or inducements on the part of applicants or affiliated persons or entities;

d. All expenses incurred in seeking the franchise award, including but not limited to, lobbying, public relations, marketing, advertising, research, salaries, legal fees, personal service agreements, contracted services, and donations or gifts to local individuals, groups or institutions.

7. All campaign contribution information shall be filed as provided in Chapter 28 of the Saint Paul Legislative Code.

8. All lobbyists shall register with the City Clerk by providing the following information:

a. Name and address;

b. Principal place of business;

c. Name and address of each person, if any, by whom the lobbyist is retained or employed or on whose behalf the lobbyist appears;

d. If the lobbyist lobbies on behalf of an association, the names and addresses of officers and directors.

Such registration shall be made within five days of adoption of this resolution or within five days of the date the person becomes a lobbyist.

9. All lobbyists shall file a list of contacts with Council Members and their aides and the Cable Communications Officer.

WHEREAS, the Council of the City of Saint Paul wishes to assist potential cable franchise applicants in obtaining information relative to City uses of a cable communications system; now, therefore, be it

RESOLVED, That Council Resolution No. 279053, Item No. 4, Page 2, be and hereby is amended, for an interim period extending from October 1, 1982 through the final date for submission of franchise applications, to read as follows:

"4. All information requests from and contacts with the Cable Communications Staff Task

Force and other City staff by potential applicants and their lobbyists shall be subject to the following procedures:

a. Potential applicants and their lobbyists may direct inquiries relative to City uses of a cable communications system to designated representatives of City staff, a list of whom is attached hereto and incorporated herein by reference;

b. Contacts with City staff, except Council members and their aides and the Cable Communications Officer, are prohibited unless arranged through one of the named designated representatives in accordance with the procedures attached hereto and incorporated herein by reference;

c. Commencing November 1, 1982, and every month thereafter through the final date for filing franchise applications, potential applicants, their lobbyists, and designated representatives except Council members, their aides, and the Cable Communications Officer, shall file with the Cable Communications Officer a report detailing the dates, places, and topics of any and all contacts;

d. Designated representatives and other City staff shall make themselves equally available to all potential applicants and their lobbyists;"

and, be it

FURTHER RESOLVED, that non-compliance with any of the provisions of this Resolution by potential applicants or their lobbyists shall result in the downrating of

the application filed by the non-complying entity; and, be it

FINALLY RESOLVED, that upon the expiration of the time, for filing franchise applications, Item No. 4, Page 2 of Council Resolution No. 279053 shall revert to its original form and read as follows:

> "4. All requests by potential applicants for information from the Cable Communications Staff Task Force and other City staff shall be through the City's Cable Communications Officer."

COUNCILMEN

Yeas Nays

Fletcher
Levine
Masanz
Nicosia
Scheibel
Tedesco
Wilson

___ In Favor

___ Against

Adopted by Council:

Date _____

Certified Passed by Council Secretary

By _____

Approved by Mayor:

Date _____

By _____

Requested by Department of:

_____

By _____

Form Approved by City Attorney

By /s/ Jane A. McPeak

Approved by Mayor for Submission to Council

By _____

CITY STAFF CABLE COMPANY CONTACT GUIDELINES

Purpose of the Guidelines

City staff has proposed extensive municipal uses for cable technology. In order to encourage positive response by cable companies to these uses we must provide open access to knowledgeable department staff. At the same time, we want to structure the contacts so that the information given to cable companies accurately reflects city and departmental priorities. For these reasons, we are setting up a structured access policy.

Timing

This policy as per City Council Resolution will be in effect from October 1st until the closing date for cable companies to submit their proposals.

Designated Departmental Representatives

The attached list states the names, addresses and phone number of those individuals designated to represent their departments or city offices. This list (including any changes registered with the City Clerk's Office) comprises the allowable contacts between city staff and cable companies representatives.

Method of Contact

Contact between the city staff and cable companies shall be in person or by letter of inquiry with minimal or no information exchange by telephone. Department heads and designated representatives shall provide adequate

accessibility to all interested cable companies. The designated representatives shall provide equal access to all cable companies. Other employees may be brought in as their expertise is necessary. However, a designated representative will attend each meeting.

Meeting Recording

The attached form shall be used in documenting all meetings between city staff and cable company representatives. The form contains the following information: date, location, attendees and subject matter covered. It shall be submitted to the City's Cable Communications Office at the end of each month. Subject matter covered should be recorded only generally – specifics that may benefit another cable company should be excluded.

CITY DEPT(S) ___

CABLE COMPANY(IES) ___

CABLE CONTACT
MEETING RECORD

DATE:

LOCATION:

ATTENDEES:

NAME	ORGANIZATION

SUBJECT MATTER COVERED:

RECORD SUBMITTED BY:

_____
DESIGNATED REPRESENTATIVE

POLICE

John McCabe	100 E. 10th Street	292-3545
Phil Sanders	100 E. 10th Street	292-3592 Ex.5
Sgt. Joseph Polski	100 E. 10th Street	291-1111 Ex.5
Off. Michael Perzichilli	100 E. 10th Street	292-3525

FIRE

John Rukavina	100 E. 10th Street	224-7811

APPENDIX E

SET ASIDE ORDINANCE

COMPLIANCE REVIEW REPORT

St. Paul Department of Human Rights
515 City Hall
St. Paul, Minnesota 55102
(612) 298-4288

Pursuant to Section 74.03A of the St. Paul Legislative Code and the rules therein, each contractor shall provide the following information:

1. Company, Contractor or Employer Identification

_____
NAME

_____
ADDRESS (NUMBER AND STREET)

_____
CITY, STATE AND ZIP CODE PHONE NO.

2. Name and locations or parent or subsidiary companies (Please indicate whether parent or subsidiary).

_____
_____
_____

3. Type of operation.

_____
_____

4. Date of most recent or immediate agreement with the City of St. Paul, contract number, if applicable, and amount of contract.

_____
_____

5. What steps have you taken to recruit female and minority employees, i.e. advertising or an affirmative action program.

_____

_____

_____

6. Name of the President of the Company. (Type or print, please.)

_____

7. Name and title of person responsible for implementing equal employment opportunity and affirmative action. (Type or print, please.)

_____
NAME TITLE

8. Name and title of person to contact regarding this report. (Type or print, please)

_____
NAME TITLE

EEO/AA POLICY STATEMENT

It is our policy to:

1. Aggressively pursue and practice equal employment opportunity (EEO) and to assure that equal employment opportunity is for all persons regardless of race, creed, religion, color, sex, national origin or ancestry, age or disability;

2. Prohibit discrimination on the basis of race, creed, religion, color, sex, national origin or ancestry, age or disability in all employment practices including but not limited to hiring recruitment, advertising, promotion, upgrading, demotion, transfer, lay off, termination, rates of pay or other forms of compensation and selection for training;

3. Fully support incorporation of non-discrimination and affirmative action (AA) rules and regulations into contracts (including subcontracts) and abide by all relevant Federal, State and Local Laws relating to EEO and AA with respect thereto;

4. Maintain a working environment for all employees free of harassment, intimidation and coercion because of race, color, creed, religion, sex, national origin or ancestry, age and disability;

5. Commit necessary time and resources to attain EEO in accordance with this EEO policy, to assist protected class persons to become successful participants in the workforce of this company, and to remove the effects of past employment practices, if any, which resulted in discrimination against protected class persons.

SIGNATURE TITLE DATE

EMPLOYMENT DATA AS OF ___, 19 ___

EMPLOYER _____

ADDRESS _____ _____ _____

NUMBER AND STREET CITY STATE

ALL EMPLOYEES (Full-time, Part-time, Temporary and Seasonal)

JOB CATEGORIES	TOTAL EMPLOYEES COLUMNS B THRU K (A)	MALE					FEMALE					
		WH (B)	BL (C)	HI (D)	AP (E)	AA (F)	WH (G)	BL (H)	HI (I)	AP (J)	AA (K)	HDCP (L)
OFFICIALS & MANAGERS												
PROFESSIONALS												
TECHNICIANS												
SALES WORKERS												
OFFICE & CLERICAL												
CRAFT WORKERS												

(SKILLED)

OPERATIVES
(SEMI-SKILLED)

LABORERS
(UNSKILLED)

SERVICE
WORKERS

CURRENT
TOTAL

TOTAL EMPLOYMENT
IN LAST REPORT

WH: White	AP:	Asian/Pacific Islander
BL: Black	AA:	Amer. Indian/Alaskan Native
HI: Hispanic	HDCP:	Handicap

I affirm that the information entered on this form and all attachments are accurate and true to the best of my knowledge.

Signature	Title	Date

DEFINITIONS OF TERMS AND JOB CATEGORIES

EMPLOYEE – means any individual on the payroll of an employer who is an employee for purposes of the employer's withholding of Social Security taxes except insurance salesmen who are considered to be employees for such purposes solely because of the provisions of Section 3121(d)(3)(B) of the Internal Revenue Code.

RACE/ETHNIC IDENTIFICATION

You may acquire the race/ethnic information necessary for this report either by visual surveys of the work force, or from post-employment records as to the identity of employees. Eliciting information on the race/ethnic identity of an employee by direct inquiry is not encouraged.

Where records are maintained, it is recommended that they be kept separately from the employee's basic personnel file or other records available to those responsible for personnel decisions.

Since visual surveys are permitted, the fact that race/ethnic identifications are not present on employment records is not an excuse for failure to provide the data called for.

Moreover, the fact that employers may be located at different addresses does not provide an acceptable reason for failure to comply with the reporting requirements. In such cases, it is recommended that visual surveys be conducted for the employer by persons such as supervisors who are responsible for the work of the employees

or to whom the employees report for instructions or otherwise.

Please note that conducting a visual survey and keeping post-employment records of the race/ethnic identity of employees is legal in all jurisdictions and under all Federal and State laws. State laws prohibiting inquiries and recordkeeping as to race, etc., relate only to applicants for jobs, not to employees.

Race/Ethnic designations as used by the Equal Employment Opportunity Commission do not denote scientific definitions of anthropological origins. For the purposes of this report, an employee may be included in the group to which he or she appears to belong, identifies with, or is regarded in the community as belonging. However, no person should be counted in more than one race/ethnic group. The race/ethnic categories used for this survey are:

WHITE – (Not of Hispanic origin) – All persons having origins in any of the original peoples of Europe, North Africa, or the Middle East.

BLACK – (Not of Hispanic origin) – All persons having origins in any of the Black racial groups of Africa.

HISPANIC – All persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

ASIAN OR PACIFIC ISLANDER – All persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands, and Samoa.

AMERICAN INDIAN OR ALASKAN NATIVE – All persons having origins in any of the original peoples or North America and who maintain cultural identification through tribal affiliation or community recognition.

HANDICAP – A handicapped person is one who (a) has a physical or mental impairment which substantially limits one or more of the individual's major life activities, (b) has a record of this impairment, or (c) is regarded as having the impairment. "Substantially limiting" causes difficulty in securing, retaining or advancing in employment.

DESCRIPTION OF JOB CATEGORIES

OFFICIALS AND MANAGERS – Occupations requiring administrative personnel who set broad policies, exercise overall responsibility for execution of these policies, and direct individual departments or special phases of a firm's operations. Includes: officials, executives, middle management, plant managers, department managers, and superintendents, salaried supervisors who are members of management, purchasing agents and buyers, and kindred workers.

PROFESSIONAL – Occupations requiring either college graduation or experience of such kind and amount as to provide a comparable background. Includes: accountants and auditors, airplane pilots, and navigators, architects, artists, chemists, designers, dieticians, editors, engineers, lawyers, librarians, mathematicians, natural scientists, registered professional nurses, personnel and labor relations workers, physical scientists, physicians, social scientists, teachers, and kindred workers.

TECHNICIANS – Occupations requiring a combination of basic scientific knowledge and manual skill which can be obtained through about 2 years of post high school education, such as is offered in many technical institutes and junior colleges, or through equivalent on-the-job training. Includes: computer programmers and operators, drafters, engineering aides, junior engineers, mathematical aides, licensed, practical or vocational nurses, photographers, radio operators, scientific assistants, surveyors, technical illustrators, technicians (medical, dental, electronic, physical science), and kindred workers.

SALES – Occupations engaging wholly or primarily in direct selling. Includes: advertising agents and sales workers, insurance agents and brokers, real estate agents and brokers, stock and bond salesworkers, demonstrators, salesworkers and sales clerks, grocery clerks and cashier-checkers, and kindred workers.

OFFICE AND CLERICAL – Includes all clerical-type work regardless of level of difficulty, where the activities are predominantly nonmanual though some manual work not directly involved with altering or transporting the products is included. Includes: bookkeepers, cashiers, collectors (bills and accounts), messengers and office helpers, office machine operators, shipping and receiving clerks, stenographers, typists and secretaries, telegraph and telephone operators, and kindred workers.

CRAFT WORKER (skilled) – Manual workers of relatively high skill level having a thorough and comprehensive knowledge of the processes involved in their work. Exercise considerable independent judgment and usually receive an extensive period of training. Includes: the

building trades, hourly paid supervisors and lead operators who are not members of management, mechanics and repairers, skilled machining occupations, compositors and typesetters, electricions, engravers, job setters (metal), motion picture projectionists, pattern and model makers, stationary engineers, tailors and tailoresses, and kindred workers.

OPERATIVES (semiskilled) – Workers who operate machine or processing equipment or perform other factory-type duties of intermediate skill level which can be mastered in a few weeks and require only limited training. Includes: apprentices (auto mechanics, plumbers, bricklayers, carpenters, electricians, machinists, mechanics building trades, metal working trades, printing trades, etc.), operatives, attendants (auto service and parking), blasters, chauffeurs, delivery workers, dressmakers and sewers (except factory), dryers, furnace workers, heaters (metal), laundry and dry cleaning operatives, milliners, mine operatives and laborers, motor operators, oilers and greasers (except auto), painters (except construction and maintenance), photographic process workers, stationary firefighters, truck and tractor drivers, weavers (textile), welders, and flamecutters, and kindred workers.

LABORERS (unskilled) – Workers in manual occupations which generally require no special training perform elementary duties that may be learned in a few days and require the application of little or no independent judgment. Includes: garage laborers, car washers and greasers, gardeners (except farm) and groundskeepers, stevedores, wood choppers, laborers performing lifting,

digging, mixing, loading and pulling operations, and kindred workers.

SERVICE WORKERS – Workers in both protective and non-protective service occupations. Includes: attendants (hospital and other institutions, professional and personal service, including nurses aides, and orderlies), barbers, charworkers and cleaners, cooks (except household), counter and fountain workers, elevator operators, firefighters and fire protection, guards, doorkeepers, stewards, janitors, police officers and detectives, porters, waiters and waitresses, and kindred workers.

ORDINANCE

Ordinance NO. 16744

Presented By/s/ Joanna Showalter
/s/ William Hilton

Referred To _____ Committee: Date _____

Out of Committee By _____ Date _____

An administrative ordinance amending Chapter 81 of the Saint Paul Administrative Code, entitled "City Procurement from Small Business or Economically Disadvantaged Persons."

THE COUNCIL OF THE CITY OF SAINT PAUL DOES ORDAIN:

Section 1.

That Chapter 81 of the Saint Paul Administrative Code entitled "City Procurement from Small Businesses

or Economically Disadvantaged Persons" as it now appears, is hereby stricken and deleted in its entirety.

Section 2.

That, pursuant to Minnesota Statutes, Section 471.345, Subdivision 8, there is hereby enacted Chapter 81 of the Saint Paul Administrative Code to be entitled "Purchasing from Set-aside Businesses", and to read as follows:

81.01 – *Definitions.* Subd. 1. For the purposes of this chapter, the following words and phrases shall have the meanings set forth in this section, except where the context clearly indicates that a different meaning is intended.

Subd. 2. *Set-aside Business* means a business entity organized for profit, including but not limited to any individual, partnership, corporation, joint venture, association or cooperative, which entity

a) is not an affiliate or subsidiary of a business dominant in its field of operation and has employees who work a total of 45,000 hours or less in the previous fiscal year, or has not more than the equivalent of $1,000,000 in annual gross revenues in the preceding fiscal year; or

b) is majority owned and controlled by a person (or persons in any combination) who is a woman, a member of any of the racial minorities defined herein, or handicapped.

Subd. 3. *Woman* means any person of the female sex.

Subd. 4. *Racial minority* means a person having ethnic origin in the black racial groups of

Africa; a person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin; a person having ethnic origin in any of the original peoples of the Far East, Southeast Asia, the Indian sub-continent or the Pacific Island (this area includes, but is not limited to, China, Japan, Korea, the Philippine Islands, Malaysia, Hawaii and Samoa); a person having origins in any of the original peoples of North America who is an enrolled member of an Indian tribe recognized as such by the government of the United States or Canada; or a person having ethnic origin in the Eskimo or Aleut peoples and who is recognized as such by either a tribe, tribal council or a suitable authority in the community. (A suitable authority in the community may be educational institutions, religious organizations, or federal or state agencies.)

Subd. 5. *Handicapped person* means any person who has suffered a substantial physical disability.

Subd. 6. *Small business* means a business entity as defined in Section 81.01, Subd. 2(a).

81.02 – *Set-aside Business Advisory Committee; composition and duties.* Subd. 1. There is hereby created a committee of 15 persons who shall be appointed in the same manner as other City committees; 5 of the 15 persons appointed shall serve for a term of one year; 5 of the persons appointed shall serve for a term of two years; and 5 of the persons appointed shall serve for a term of three years. The Mayor shall designate one of the persons appointed to serve as chair.

Subd. 2. *Duties.* The committee shall hold meetings at such times as agreed upon by the members. The committee shall review the certification recommendations of its subcommittees; hold public hearings on those recommendations;

resolve disputes as to the qualifications of a set-aside business as such a business; maintain and add to a master list of set-aside businesses; and do such other things as are reasonably necessary to effectuate the purposes of this chapter. Any aggrieved person may appeal the committee's decisions to the Council which shall have the power to modify any decision of the committee.

81.03. – *Women's set aside business subcommittee; racial minorities' set-aside business subcommittee; small business and handicapped persons' set-aside business subcommittee.* Subd. 1. *Women's set-aside business subcommittee.* The chair of the committee created in the preceding section shall designate 5 members to serve on the women's set-aside business subcommittee. The subcommittee shall screen, promote and do such other things as are necessary to secure the participation of set-aside businesses, which are majority controlled by women, in the program established by this chapter, but all actions of the subcommittee must be approved by the committee.

Subd. 2. *Racial minorities' set-aside business subcommittee.* The chair of the committee created in the preceding section shall designate 5 members to serve on the racial minorities' set-aside business subcommittee. The subcommittee shall screen, promote and do such other things as are necessary to secure the participation of set-aside businesses, which are majority controlled by a racial minority, in the program established by this chapter but all actions of the subcommittee must be approved by the committee.

Subd. 3. *Small business and handicapped persons' set-aside business subcommittee.* The chair of the committee created in the preceding section shall designate 5 members to serve on the small business and handicapped persons' set-aside

subcommittee. The subcommittee shall screen, promote and do such other things as are necessary to secure the participation of small businesses or set-aside businesses which are majority controlled by a handicapped person, in the program established by this chapter but all actions of the subcommittee must be approved by the committee.

81.04 – *Set-aside of appropriations.* The City shall for each fiscal year designate and set aside for awarding to set-aside businesses approximately 20 percent of the funds appropriated for the purchase of goods and/or services, including construction work. Of that percentage, approximately one-half thereof shall be used to purchase goods and/or services, including construction work, from small businesses or set-aside businesses, the majority control of which is vested in a handicapped person; approximately one-quarter thereof shall be used to purchase goods and/or services, including construction work, from set-aside businesses, and majority control of which is vested in a woman; and approximately one-quarter thereof to purchase goods and/or services, including construction work, from set-aside businesses, the majority control of which is vested in a person of a racial minority.

81.05 – *Application; how processed.* The City via its purchasing division shall process applications from any interested business and shall forward the applications to the set-aside business advisory committee for its review and approval as a bona fide set-aside business. Until approval or rejection of any application of any interested business, the City may allow participation in the program established by this chapter pending a decision of the committee.

81.06 – *Percentage to a set-aside business.* The City may, whenever it deems it feasible, solicit bids that require the lowest responsible bidder to subcontract a portion or percentage of work to a bona fide set-aside business.

81.07 – Restrictive competitive bids. The City may, whenever it deems it feasible, solicit competitive bids from among only set-aside businesses.

81.08 – *Denial of access to a public service; relief.* Any set-aside business that is aggrieved by a wrongful denial of the benefits of this chapter may seek relief pursuant to Chapter 74 of the Legislative Code as a denial of access to a public service.

81.09 – *Rules, regulations and forms.* The Mayor is authorized, acting through the Director of Finance and Management Services, to promulgate such rules, regulations and forms as may be needed to carry out the duties and responsibilities set forth herein.

Section 3.

This ordinance shall take effect and be in force thirty (30) days from and after its passage, approval and publication.

COUNCILMEN
Yeas Nays
Hunt
Maddox 5 In Favor

McMahon
Showalter 0 Against

Tedesco
Adopted by Council:
Date DEC 18 1980

Certified Passed by
Council Secretary

/s/ Rose Mix

Requested by
Department of:

_____

By _____

Form Approved by
City Attorney

By /s/ Paul McClosky

Approved by
Mayor for Submission
to Council

By _____

Approved by Mayor
Date DEC 22 1980

By /s/ George Sedome

PUBLISHED DEC 27 1980

APPENDIX 13
LETTER FROM CITY'S ATTORNEYS

LAW OFFICES
ROBINS, ZELLE, LARSON & KAPLAN
1210 MINNESOTA BUILDING
SAINT PAUL, MINNESOTA 55101
TELEPHONE (612) 224-5884

[Letterhead omitted in printing]

February 27, 1984

Harold R. Farrow, Esq.
Farrow, Schildhause, Wilson & Rains
401 Grand Avenue, Suite 200
P. O. Box 2290
Oakland, California 94621

Re: Nor-West Cable Communications
Partnership v. City of Saint Paul
Our File No.: 14942-0000

Dear Mr. Farrow:

As I have been in trial in North Dakota since the first week of January, I have been unable to reply to your letter of December 28, 1983. I have now had an opportunity to discuss this matter with our client, the City of Saint Paul, and am in a position to respond. Please excuse the delay.

In both your December 28 letter and your December 5, 1983, letter addressed to Mayor Latimer and the Saint Paul City Council, you requested that the City issue a cable television franchise to Nor-West Cable Communications Partnership equivalent to that issued by the City to Continental Cablevision of St. Paul, Inc. You further stated that if such a franchise were issued, Nor-West

would seek a Certificate of Confirmation from the Minnesota Cable Communications Board.

From the inception of the franchising process, the City has made it clear that any franchise ultimately issued by the City would be "non-exclusive," as you appear to recognize in your letter of December 28. For example, at page 1 of the Request for Proposals, the city invites proposals for a "15-year, non-exclusive cable communications franchise," and both the July 29, 1983, City Council resolution and the Franchise Ordinance now before the Cable Communications Board award a "non-exclusive" franchise to Continental. The franchise, conditionally granted to Continental, is therefore non-exclusive, both in law and in fact. The City has reserved its right to grant one or more additional franchises at such time, if ever, as it might wish to do so.

However, please be advised that the City considers it inappropriate to consider awarding an additional franchise to Nor-West at the present time. Even though Nor-West here requests a franchise, in court Nor-West is contending that a franchise is unnecessary. The Actions brought by Nor-West at the Cable Communications Board and against the City in Federal Court challenge the validity of the entire franchising process and result, as well as the capabilities and integrity of selected City officials, employees, and consultants.

The City has confidence in the validity and integrity of its process, but under the adversarial conditions created by your client the City of Saint Paul declines to consider the desirability of granting a franchise to Nor-West at this time. When the issues presented by the

pending complaints are resolved, the City may then find it appropriate to consider additional franchises.

Very truly yours,

ROBINS, ZELLE, LARSON & KAPLAN

/s/ Ernest I. Reveal
Ernest I. Reveal

EIR:ah

cc: Peter H. Grills, Esq.
Ronald L. Haskvitz, Esq.

APPENDIX 14

NOR-WEST'S APPLICATION

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP

SUMMARY OF PROPOSAL

Cable has been long in coming to St. Paul. By waiting, however, St. Paul has embraced a unique opportunity.

The entertainment features which cable can offer are well known to citizens of St. Paul. Clearly, this one-way programming will be accepted with great enthusiasm. But a new frontier in communications is now being forged. Advances in deregulation and computer technology have created opportunities for using broadband cable systems as an important medium for helping homes, businesses, government, and public institutions interact with one another – two-way communications.

Communications increasingly takes the form of not only voice, but computer interchange, video conferencing, facsimile, security monitoring, and remote building maintenance systems as well. The ever-increasing popularity of computers and word processing has made data interchange a key form of communications. And broadband cable has become the backbone of such data communications.

Despite the excitement generated by franchising promises, the cable television industry has only peripherally participated in the broadband cable communications revolution. Most broadband facilities transmitting

data have been geographically limited to building complexes. Yet the technology is here today to extend the broadband revolution to an entire metropolitan area – homes, schools, government institutions and businesses.

St. Paul's Role in the Broadband Communications Revolution

With considerable vision, St. Paul has requested a cable communications system that can bridge and combine the worlds of entertainment and computer communications on a City-wide basis. The City's unique challenge seeks to make the full communications potential of cable a reality.

By furnishing better and more cost efficient communications, the City has recognized that cable can help attract new businesses and come to serve as a telecommunications hub for the Twin Cities metropolitan region. Further, cable can significantly reduce the cost and enhance the effectiveness of local government.

It is easy to become carried away with the potential of cable. In other communities, pie-in-the-sky promises have led only to subsequent disillusionment and resentment when the services delivered fell far short of the overly optimistic pledges made by some companies.

The challenge is to prepare a plan that is both farsighted and realistic. Nor-West Cable Communications Partnership, a unique company in its own right, has prepared a comprehensive plan to achieve the City's own unique objectives. It is a plan that melds both the world of entertainment cable and the high-technology world of communications.

The plan is based on partnerships – within Nor-West, between Nor-West and the City, between Nor-West and the community, and between Nor-West and the MetroVision, and other telecommunications experts.

The Nor-West Partnership

Nor-West Cable Communications Partnership is a cable company wholly owned and controlled by local citizens. Nor-West's partners have pledged to place substantial capital, at risk, to build the community's cable system.

Beyond that commitment of capital is the commitment of each Nor-West partner to assume unlimited liability for the financial success of the venture. In effect, each of Nor-West's partners has personally guaranteed St. Paul that Nor-West will deliver on the promises contained in this application. That pledge represents the highest level of financial responsibility possible.

Elsewhere, citizens have come together with the objective of providing a superior level of cable for their communities. The result often has been less than ideal – manifesting itself in the form of "rent-a-citizen" programs, where the local investor becomes merely a minor partner in a major national company with little influence and little money at risk, and therefore little influence in the system.

Ownership, Control and Management

Nor-West brings to bear a unique depth of management experience. The partners know, understand, and are

concerned about the City of St. Paul and the welfare of its residents. Nor-West's Managing General Partner, Mr. Mark Van Loucks, is an experienced executive with substantial background in national cable television operations.

MetroVision, Inc. the manager of the Nor-West system, is well recognized as one of the leading cable television operators in the nation. Bertman Corporation, Nor-West's advisor on communications uses of cable, is unique in the industry in its technical expertise regarding data communications uses of cable and videotex applications.

Nor-West has produced a unique blend of local ownership and control, national cable television experience, and in-depth experience in communications uses of cable television networks.

Our partners will control the operation of the cable television system. To assure substantial control by St. Paul residents, the partnership has granted each partner, regardless of ownership, one vote where major decisions are under consideration with respect to senior system management and for major programming changes. Thus, Nor-West's partnership is multi-dimensional and unique.

Partnership for Entertainment

Nor-West will bring the best entertainment services to St. Paul, including virtually every premium and satellite programming service available today and currently planned for the future. Universal service will be provided free. Basic service will cost only $6.00 per month, with a

33 1/3 percent reduction for citizens of limited financial means. Popular premium services, such as Home Box Office and The Movie Channel, will cost $8.75 per month. Also, we will offer a $3.00 entertainment package featuring the best in satellite delivered programming. We have pledged to hold our competitive rates constant for three years. The buying power of MetroVision, passed along to Nor-West and its subscribers, produces substantial savings and helps us retain this stable price structure.

Cable brings a new feature to video programming – the ability of parents to restrict what their children watch. Nor-West's system offers full control to parents through a programmable channel lock-out system, utilizing the best technology available.

Nor-West also will make available to the handicapped, free of charge, remote control channel selectors.

Most responsible companies will offer similar video entertainment programming services at comparable charges. After all is said and done, there is limited differentiation possible. All companies must access the same satellites and purchase the same programming. And there are only so many television channels that appeal to the consumer before video shock sets in.

Thus, entertainment programming is but the departure point for Nor-West's cable system for St. Paul.

Partnership for Innovative Technical Design and Two-Way Communications

The most important element of Nor-West's proposal is the capability to provide a full array of communications services to *every home, business, school and government installation* in the City.

The traditional entertainment oriented cable system design provides only low-frequency home to headend transmission, greatly restricting the number and type of signals that can be transmitted. Since the same frequencies are used by citizens band and other services, the interference problem greatly limits the usefulness of this service. Our design totally overcomes this serious technical limitation.

Two-way interactive services will be able to teach homebound children, allow people to work at home and shop and bank from home. The system also will permit subscribers to originate video from the home, although the number of users at any one time would be limited. The system will provide businesses with high-speed data transmissions, video conferencing, and remote control of heat, air-conditioning and security systems. And it will allow government to efficiently provide traffic control, among other options.

Our IRIS videoconferencing system provides portable split-screen teleconferencing, allowing several parties to talk simultaneously, seeing each other on a segmented or split-screen image.

It is not enough simply to transform cable into a communications medium. Other communities have established such institutional networks, usually serving only a

limited part of their total metropolitan area. If the network even reached the home residence at all, the technical limitations impeded the ability of the home subscriber to communicate. Typically, the subscriber had many channels coming into the home, but few "noisy" channels going out.

Nor-West has overcome that technical hurdle by proposing a dual subscriber network, serving *every location* in the City, where the second cable is a mid-split design which provides equal channel capacity in both directions. This is our key to offering true broadband communications services to the home. Signals transmitted from the home are switched at our system headend for retransmission at other locations. Our system is analogous to an extremely wide-band telephone network which transmits not data from the home, even including video.

To keep our system technically up-to-date, we have set aside a separate R & D budget which totals nearly $1,200,000 over the term of the franchise. The Bertman Corporation will provide continuing R & D assistance.

Our system design uses fiber optic transmission to interconnect our headend to the hubs. This forward looking approach produces tremendous interconnect capacity, helping to make broadband home-to-home service a near-term and practical reality.

The design also incorporates a fully addressable system using the best converter available, Zenith's Z-TAC unit. With addressability, we can offer pay-per-view programming ordered up over telephone. The same technology will let St. Paul organizations conduct private

meetings via television with reception restricted specifically to their numbers.

Our system is designed for 500 MHz technology and employs double and triple redundancy on all critical components. With our construction schedule, plant will be complete and all subscribers served within 30 months of construction start. And, we will begin construction within six months of certification.

Partnership with City Government

Developing St. Paul's two-way communication system will require an active partnership between the City and telecommunications professionals who know the reality and limitations of today's technologies. Solid engineering and planning is imperative if St. Paul is to avoid the pitfalls that have befallen other localities.

Nor-West has responded to the City's initiative by offering the necessary technical resources. Upon award of the franchise, Nor-West will provide not only its own technical staff, but also will enlist the support of outside experts, such as MetroVision and Bertman Corporation, to provide the type of in-depth planning necessary to bring exciting ideas to practical fruition.

Equipment such as data modems, traffic control computers, and voice trunking equipment will be needed to supplement technical expertise. Such equipment is expensive. Most cities have been very reluctant to invest in technologies with which they are unfamiliar. Nor-West will provide a $200,000 fund from which the City can draw to purchase the equipment needed to support the

services selected. But equipment without technical support is meaningless. Therefore, the Nor-West will give the city critical technical assistance through providing $150,000 of engineering and planning services for the study of data communications, voice trunking, videotex, energy management, traffic control and others.

Thus, Nor-West will bypass the barrier of promises which never seem to be fulfilled. To supplement our mechanisms for providing technical assistance and purchasing equipment. Nor-West will provide an additional fund of $50,000 with which to wire key government buildings. Without costly wiring, services cannot be delivered.

To help support the City's developmental data base effort, we will pay the City $ .50 per month for each videotex and data communications home subscriber. We project this to total $2,870,000 over the term of the franchise. In such a way, Nor-West and St. Paul will become partners in developing home interactive services.

As an additional measure of assurance, our partners have written into their partnership agreement that the City will have the first right of refusal to purchase the cable system, should Nor-West ever sell its assets to another party. Should the City decline to purchase the system, it still will be afforded 5% of the net purchase price. This could produce from $3-6 million additional benefit to St. Paul.

Partnership With the Community

Nor-West is keenly aware of the role that the St. Paul Cable Cooperative has played in the evolution of cable in

the City. When putting together our proposal, a key element has been the development of a role for the Cooperative through their providing local origination programming under contract with Nor-West. Our discussions have matured to the point of receiving a proposal from the Cooperative, which we believe will produce a formal agreement, upon award of the franchise. We would like to bring the Co-op into our partnership concept.

Nor-West's local origination and access proposal is not drawn from the shelf. Our company is eager to see cable utilized for local programming purposes, especially for teleconferencing, which will tie together groups and individually serve the seventeen planning districts. Nor-West has offered to give one percent of its gross revenues, estimated at $5,180,000 over the life of the franchise, to the seventeen St. Paul Planning Districts, to help provide them a reliable source of funding.

The labor movement has been a hallmark of St. Paul through most of its history. We want to participate in the progressive movement that has been tradition in St. Paul and have signed a union agreement, even prior to submitting this application.

Equal opportunity and affirmative action are other St. Paul traditions. Our program is intended to aggressively fulfill the letter of the law as well as the spirit in which the law was created. We will attract and train St. Paul minorities with genuine affirmative action. (Indeed, this application marks an important milestone in cable television. We believe that it is the first time a major city

cable television system has been designed by a female engineer, Ms. Ann R. Muller.)

Nor-West has pledged to make maximum feasible use of local resources for employment, purchasing, and contracting.

It is our belief, for example, that cable communication systems should serve to *support* local companies, not take business from them. To that end, we have proposed to encourage access to our system and work with local alarm companies in St. Paul.

Further, 3M will provide much of the home data communications equipment. Our partners live in the community and have a direct concern with its economic development. Even our financing comes from a local bank, The First National Bank of St. Paul. The purchase and profits generated by the cable system are intended to *remain in the community* – to benefit the community.

Teleport/St. Paul

St. Paul has mandated the construction of a satellite uplinking facility. Elsewhere, the typical facility has consisted of one or perhaps two earth stations, lacking the technical capacity to become a truly viable economic entity supportive of the community. At best, such a facility may become a financial burden on the home subscriber.

Nor-West has gone one step beyond the City's request for a satellite facility and has suggested that Teleport/St. Paul be developed as an integrated part of the City's cable communications system.

A Teleport is major facility with may different antennae, which can access virtually all communications satellites. Complex switching and gateway equipment is included. Such a project is now under development in New York City as a co-venture between Merrill Lynch and the Port Authority of New York and New Jersey.

Nor-West's partners have proposed to fund a feasibility study of $150,000 to evaluate the development of Teleport/St. Paul, and will invest a minimum of $500,000 and up to $1 million in that project, pending a favorable report. The remaining $1-1.5 million of funding would be obtained from a number of sources, perhaps drawing upon economic development resources.

Teleport/St. Paul could help turn the City into a communications hub of the Twin Cities metropolitan region. At a minimum, it would provide a true communications role for the cable communications network proposed by Nor-West.

Local Origination and Public Access Support

It is Nor-West's intention to engage the St. Paul Cable Cooperative to provide programming staff. We will help train Co-op staff in the use of equipment which we provide.

Our commitment to programming is substantial. It includes a $100,000 capital grant to help the education community upgrade their equipment and a second $100,000 access grant to assist the access community.

We expect to have 31 access and origination staff members by year 5 of operation. We will pay $100,000 per year total to SPIAC and SPCAC.

Our local origination equipment includes a $225,000 studio, a $155,000 mobile van and a $15,000 audio studio.

The separate access facilities include a $225,000 studio, a $10,000 editing suite, $45,000 of portapak equipment, a $50,000 mobile van and $28,000 in IRIS teleconferencing units.

A Strong Financial Commitment

A combined entertainment and communications broadband network is a costly undertaking. Nor-West's partners will invest up to $39 million in system construction during just the first three years. Substantial additional investment is contemplated during the lifetime of the franchise.

This investment is backed up by a $40 million bank letter from the National Bank of St. Paul. But the strongest commitment is that of the partners themselves, who are personally and individually liable to meet the financial needs of the partnership.

An Evolving Cable Communications System Through Partnerships

Nor-West's cable system will remain up-to-date, with a plan for continuing research and development supported by our own resources and supplemented by those of our manager, MetroVision.

Not only will Nor-West gain experience and technology through MetroVision, we will also avail ourselves of their considerable buying power, whose savings will be passed along to Nor-West and its customers.

The ultimate objective is to provide St. Paul with a visionary, realistic cable communications system that serves today's needs and can grow to meet future requirements. Through partnerships, St. Paul's cable communications system will continue to evolve to meet that promise.

Our plan is exciting and realistic. It is supported by the personal pledge of every Nor-West partner, the support of MetroVision as Nor-West's system manager, and backed by the technical resources of some of the same people who pioneered the data communications revolution. Nor-West is a true partnership of local citizens who propose to bring to their community an uncommon and exciting combination of entertainment and information exchange via cable.

NOR-WEST CABLE
SERVICE AND CHANNEL OFFERINGS

UNIVERSAL SERVICE

Cable Channel	Service
1	DATA
2	KTCA-TV
3	WTBS-TV
4	WCCO-TV
5	KSTP-TV
6	Regional Interconnect
7	Cable Guide
8	WGN-TV
9	KMSP-TV
10	Weather Radar/Storm Alert
11	WTCN-TV
12	Community Bulletin Board
13	School Bulletin Board
*14	Reserved
*15	Reserved
*16	Reserved
17	KTCI-TV
18	Community Programming
19	Handicapped Access
20	Public Access
21	Government Access
22	Educational Access
23	Educational Access
24	Educational Access
25	Minority Access
26	Health Access
27	Senior Citizen Access
28	Ecumenical Access
29	WFBT-TV
30	Arts & Culture Access

31	Leased Access
32	Leased Access
*33	Reserved
*34	Reserved
*35	Reserved
*36	Reserved

BASIC SERVICE

Cable Channel	Service
*37	Buena Vision Channel
38	Spanish International Network
39	Black Entertainment Television
*40	The Channel Black
*41	The SILENT Network
42	Cable Health Network
43	Nickelodeon/Arts
*44	KidVid Network
45	ACSN – The Learning Channel
46	Modern Satellite Network
47	Satellite Program Network
48	Daytime
49	The Weather Channel
50	C-Span
51	Cable News Network I
52	Cable News Network II
53	Satellite News Channel I
54	Satellite News Channel II
55	Financial News Network
56	Dow Jones Cable News
*57	Video Mail Order
58	PTL/Trinity/CBN
59	Eternal Word/Nat'l. Jewish TV
60	DATA
61	DATA

PREMIUM SERVICES

Cable Channel	Service
62	Pay-Per-View
63	Pay-Per-View
64	Pay-Per-View
65	Home Box Office
66	Cinemax
67	Showtime
68	The Movie Channel
69	Galavision
70	Disney Channel
*71	Getty Sports Channel
*72	Reserved For Future Use

ENTERTAINMENT PACKAGE

Cable Channel	Service
73	ESPN
74	MTV
75	Nashville Network
76	Apollo Entertainment TV
77	Rock 24
*78	Pop Network
*79	Cable Newspaper
80	Biznet
81	Reuters News View
82	UTV Cable Network
83	USA Network
*84	Reserved
*85	Reserved
*86	Reserved
*87	Reserved
*88	Reserved

*Future Services

NOR-WEST CABLE COMMUNICATIONS
PARTNERSHIP RATE SCHEDULE FOR
THE ST. PAUL SYSTEM

RESIDENTIAL SERVICES:	FIRST SET RATE	SECOND SET RATE	INSTALLATION FEE
UNIVERSAL	FREE	FREE	$ 20.00(1)
BASIC	$ 6.00(2)	4.75	20.00(2.3)
REMOTE CORDLESS FEATURE	1.75(4)	1.75(4)	20.00(5)
A/B SWITCH	FREE(6)	FREE(6)	FREE(6)
DELUXE FM (WITH TV)	3.50	N/A	20.00(3)
(SEPARATE)	4.50	N/A	20.00(3)
ENTERTAINMENT PACKAGE	3.00	FREE	5.00(7)
ANY PREMIUM SERVICE: HBO, SHOWTIME, CINEMAX, MOVIE CHANNEL, GALAVISION, DISNEY CHANNEL, GETTY SPORTS	8.75	FREE	5.00(7)
PAY-PER-VIEW	VARIABLE	FREE	FREE
PLAY CABLE	11.00	N/A	20.00
TEXT INTERACTIVE	7.50	N/A	35.00
BANK-AT-HOME	VARIABLE	N/A	N/A
TRANSACTIONS SERVICES	VARIABLE	N/A	N/A
DATA TRANSMISSION	40.00	N/A	35.00

MAXIMUM VISIT CHARGE	N/A	N/A	20.00(8)
CONVERTER DEPOSIT	N/A	N/A	NONE(9)

NOTES:

(1) THE INSTALLATION CHARGE FOR UNIVERSAL SERVICE WILL BE BILLED IN FOUR INSTALLMENTS OF $5.00 DURING THE FIRST FOUR MONTHS OF SERVICE.

(2) BASIC SERVICE SHALL BE MADE AVAILABLE TO ELDERLY AND HANDICAPPED PERSONS WITH A SHOWING OF FINANCIAL NEED AT A CHARGE OF $4.00 PER MONTH WITH INSTALLATION FEE WAIVED.

(3) INSTALLATION CHARGES WILL BE WAIVED FOR PERIOD OF 60 DAYS IN EACH NEW SECTION WHERE CABLE SERVICE IS INITIATED FOR BASIC AND FM SERVICE ONLY.

(4) INFRARED REMOTE CONTROL CONVERTERS SHALL BE MADE AVAILABLE FREE OF CHARGE TO HANDICAPPED AND DISABLED SUBSCRIBERS.

(5) SEPARATE VISIT ONLY.

(6) A/B SWITCHES WILL BE PROVIDED TO ANY SUBSCRIBER FREE ON REQUEST.

(7) THERE WILL BE A $5.00 TRANSACTION CHARGED FOR THE ORDERING OF ONE OR MORE PREMIUM SERVICES AT ANY ONE TIME.

(8) THE MAXIMUM VISIT CHARGE (RELATING TO UNIVERSAL OR BASIC SERVICE ONLY) SHALL BE $20.00.

(9) CONVERTER DEPOSITS WILL NOT BE CHARGED INITIALLY. HOWEVER, THE COMPANY RESERVES THE RIGHT TO CHARGE CONVERTER DEPOSITS SHOULD EXPERIENCE PROVE THAT LOSSES ARE OTHERWISE EXCESSIVE. INTEREST AT THE RATE OF 6% PER ANNUM WILL BE PAID ON ANY SUCH CHARGE AND THE CHARGE WILL NOT EXCEED THE REPLACEMENT COST OF THE EQUIPMENT.

APPENDIX 15

CLERK'S NOTICE

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

CIVIL CASE NO:
3-83-1228

Clerk's Notice under Rule 77(d)
Federal Rules of Civil Procedure

DATE: 11-18-83

NOR-WEST CABLE

Plaintiff,

vs.

CITY OF ST. PAUL

Defendant

You are hereby notified that the following was filed this date in the above mentioned action.

ORDER (Short-M; 11-15-83) Mo. to stay consideration of the mo. to intervene as deft. denied; mo. to intervene as deft. granted; applicant for intervention Continental Cablevision of St. Paul granted leave to file answer.

ORDER (Short-M; 11-17-83) Deft. City of St. Paul's mo. to stay proceedings granted in part: all proceedings in this action stayed until March 1, 1984 or until Cable Board issues certificate of confirmation; Deft. City of St. Paul/deft. Continental Cablevision directed to use best efforts to expedite issuance of final order by Cable Board;

stay shall not be deemed to have any impact on economic damages claimed by pltff

WILLIAM S. ROSEN
0116 Conwed Tower
444 Cedar St.
St. Paul, MN 55101

RONALD L. HASKVITZ
1250 Builders Exchange Bldg
609 2nd Ave. So
Mpls., MN 55402

ROBERT E. HESS, Clerk
By /s/MA Deputy

EDWARD STARR
City of St. Paul
City Attorney
St. Paul, MN 55101

ELLIOT S. KAPLAN
1210 Minnesota Bldg
St. Paul, MN 55102

APPENDIX 16

LETTERS FROM NOR-WEST

LAW OFFICES OF
FARROW, SCHILDHAUSE, WILSON & RAINS

[Letterhead Omitted In Printing]

December 5, 1983

Honorable George Latimer, Mayor
Members of the City Council
City of St. Paul
St. Paul City Hall
St. Paul, Minnesota 55102

Dear Mayor Latimer and Members of the City Council:

Nor-West Cable Communications Partnership hereby respectfully requests the City of St. Paul to issue to it a cable television franchise on terms at least as favorable as the terms and conditions of the franchise recently issued by the City to Continental Cablevision of St. Paul, Inc.

You will recall that the City Council of St. Paul found that the Proposal submitted by Nor-West not only satisfied every requirement of the City's Request for Proposals, but also was the best proposal submitted to the City. Nor-West continues to offer to meet all of the lawful requirements, as well as to meet the lawful requirements contained in the franchise issued to Continental Cablevision. It is expressly understood by Nor-West that its franchise will be non-exclusive, i.e., in addition to the franchise issued to Continental Cablevision. Nor-West does not seek an exclusive franchise from the City.

Upon the issuance of a franchise identical to that issued to Continental Cablevision, Nor-West will seek

from the Minnesota Cable Communications Board a certificate of confirmation, expressing there its full intention and preparedness to satisfy all lawful requirements in the franchise.

We trust the City of St. Paul has no intention of issuing an exclusive franchise to Continental Cablevision, especially where state and federal law require that cable television franchises be non-exclusive in word and deed. This request provides the City with an excellent opportunity to demonstrate its understanding of the meaning of "non-exclusive."

We look forward to your prompt response to this request.

Very truly yours,

FARROW, SCHILDHAUSE, WILSON & RAINS

/s/ Harold R. Farrow
Harold R. Farrow

HRF/ct

cc: Mr. Robert A. Brunig
Mr. Edward Starr
Mr. Ernest I. Reveal
Mr. Ronald L. Haskvitz

LAW OFFICES OF
FARROW, SCHILDHAUSE, WILSON & RAINS

[Letterhead Omitted In Printing]

December 28, 1983

Ernest I. Reveal, Esq.
Robins, Zeele, Larson & Kaplan
1210 Minnesota Building
46 East Fourth Street
St. Paul, Minnesota 55101

Dear Mr. Reveal:

Your attention is respectfully directed to the enclosed copy of a letter dated December 5, 1983 from our office, on behalf of Nor-West Cable Communications Partnership, to Mayor Latimer and the Members of the City Council of the City of St. Paul. (A copy of this letter was previously mailed to you on December 5, 1983.) Your attention is also respectfully directed to the enclosed copy of a reply on behalf of the City of St. Paul, dated December 19, 1983, requesting that we direct our inquiries to you.

This letter formally requests that the City of St. Paul, or you on its behalf answer our letters of December 5, 1983. Nor-West Cable Communications Partnership respectfully requests the City of St. Paul to issue to it a cable television franchise on terms equivalent to, and at least as favorable as, the franchise issued by the City to Continental Cablevision of St. Paul, Inc.

Nor-West Cable Communications Partnership does not seek an exclusive franchise from the City of St. Paul. The franchise issued by the City of St. Paul to Continental Cablevision of St. Paul, Inc., is a non-exclusive franchise. There is, therefore, no legal or practical obstacle to the issuance by the City of St. Paul of a second franchise to Nor-West. This is especially true because the City Council of St. Paul found that the proposal submitted by Nor-West not only satisfied every requirement of the City's Request for Proposals, but also was the *best* proposal submitted to the City. Nor-West continues to offer to meet all the lawful requirements of the Request for Proposals,

as well as all of the lawful requirements contained in the franchise issued to Continental Cablevision.

Upon the issuance of a franchise equivalent to that issued by the City to Continental Cablevision, Nor-West will seek from the Minnesota Cable Communications Board a certificate of confirmation, expressing there its full intention and preparedness to satisfy all lawful requirements in the franchise.

We trust that, as the law of the State of Minnesota expressly forbids the issuance of exclusive cable television franchises, you will take particular pains with your client, in answering this request, to insure that the spirit of the law, as well as its letter is scrupulously observed.

We feel certain that the State of Minnesota, in expressly forbidding exclusive cable television franchises, did not intend to condone a process whereby a city, using semantics and subterfuges, can purport to issue a non-exclusive franchise but instead issue a *de facto* exclusive franchise as a reward for the willingness of a chosen cable television monopolist to curry favor with political officials through donations of cash, equipment and services and a willingness to accept abject surrender of its First Amendment freedoms.

This request provides the City of St. Paul with an excellent and timely opportunity to demonstrate its understanding of the meaning of the term "non-exclusive," and its committment to equity, ethic and morality.

We would appreciate the courtesy of a reply on or before January 11, 1984.

Yours very truly,

FARROW, SCHILDHAUSE, WILSON & RAINS

/s/ Harold R. Farrow
Harold R. Farrow
Attorneys for Nor-West Cable Communications Partnership

HRF/ct
Enclosures

APPENDIX 17
INDEMNIFICATION AGREEMENTS

* * *

f. All insurance policies maintained pursuant to this franchise shall contain the following endorsement:

> "It is hereby understood and agreed that this insurance policy may not be cancelled nor the intention not to renew be stated until sixty (60) days after receipt by the City, by registered mail, of written notice of such intention to cancel or not to renew."

g. Nothing in this franchise shall relieve any person from liability arising out of the failure to exercise reasonable care to avoid injuring the Company's facilities while performing any work connected with grading, regrading or changing the line of any street or public place or with the construction or reconstruction of any sewer or water system.

SECTION 19. INDEMNIFICATION

Company shall, at its sole cost and expense, fully indemnify, defend and hold harmless the City, its officers, boards, commissions and employees against any and all claims, suits, actions, liability and judgments for damages (including but not limited to reasonable expenses for outside legal fees and disbursements and liabilities assumed by the City in connection therewith):

a. To persons or property, in any way arising out of or through the acts or omissions of Company, its servants, agents or employees or to which Company's negligence shall in any way contribute;

b. Arising out of any claim for invasion of the right of privacy, for defamation of any person, firm or corporation, or the violation or infringement of any copyright, trademark, trade name, service mark or patent, or of any other right of any person, firm or corporation (excluding claims arising out of or relating to City or access programming);

c. Arising out of Company's failure to comply with the provisions of any federal, state, or local statute, ordinance or regulation applicable to Company in its business hereunder;

d. Arising out of any claim wherein damages or any other relief is sought as a result of the City's cable communications franchising procedure or as a result of the awarding of the cable communications franchise, or as a result of City's failure to award the franchise to any other person, partnership, corporation or other legal entity. The indemnification provided for herein shall not extend or apply to any acts of the City constituting a violation or breach by the City of the contractual provisions of the franchise ordinance, unless such acts are a result of the order of a court or administrative agency or are caused by the act or acts of Company; and

e. In the event that the City awards any additional cable communications franchise in any future franchise process to a firm other than Company, then Company agrees that it will not bring, nor cause to be brought, any action, suit or other proceeding claiming damages, or seeking any other relief against City, its officials, officers, boards, commissions, employees or agents for any award of a franchise made in conformity with Chapter 238 of

Minnesota Statutes and the Rules of the Minnesota Cable Communications Boards.

The City shall give Company reasonable notice of the making of any claim or the commencement of any action, suit or other proceeding covered by the provisions of this section. The Company shall cooperate with the City in the defense of any such action, suit or other proceeding at the request of the City; however, in the absence of such request, nothing herein shall be deemed to prevent the Company from cooperating with the City and participating in the defense of any litigation by its own counsel at the Company's cost and expense. Such cost and expense shall include, but not be limited to, fees for outside attorneys and special consultants.

No recovery by the City of any sum by reason of the Letter of Credit required in Article I, Section 17, shall be construed as any limitation upon the liability of the Company to the City under the terms of this section, except that any sum so received by the City shall be deducted from any recovery which the City might have against the Company under the terms of this section. The provisions of this section shall not be dependent or conditioned upon the validity of this ordinance or the validity of any of the procedures or agreements involved in the award or acceptance of the franchise, but shall be and remain a binding obligation of the City and Company even if this ordinance, any part hereof, or grant of the franchise is declared null and void in a legal or administrative proceeding. It is expressly the intent of Company and City that the provisions of this section shall survive any such declaration and shall be a binding obligation of and shall

inure to the benefit of the Company and City and their successors and assigns, if any.

It is the purpose of this section to provide maximum indemnification to the City under the terms set out herein and, in the event of a dispute as to this section, it shall be construed, to the greatest extent permitted by law, to provide for the indemnification of the City by Company.

SECTION 20. SERVICE OF PROCESS AND CONSENT TO JURISDICTION

The Company shall designate an agent within the City upon whom process against it may be served on behalf of the City or any other party in enforcing this franchise or in asserting any other right or claim. The Company, for such purposes, and any other purposes, hereby consents to, and submits to, the laws, jurisdiction and Courts of the State of Minnesota.

SECTION 21. DEBT FINANCING

The Company shall make a good faith effort to obtain debt financing for construction and operation of the St. Paul cable communications system from the Port Authority of the City of Saint Paul, provided that the terms and conditions for such debt financing are as favorable to the Company as those available to the Company from other lending sources.

SECTION 22. PUBLIC STOCK OFFERING

a. The Company shall make available for purchase by St. Paul residents and non-profit organizations twenty percent

* * *

INDEMNITY AGREEMENT

INDEMNITY AGREEMENT made this 14th day of November, 1983 by and between Continental Cablevision of St. Paul, Inc., a Minnesota corporation, party of the first part, hereinafter called "Indemnitor", and the City of Saint Paul, a Minnesota municipal corporation, party of the second party, hereinafter called "Indemnitee",

WITNESSETH:

WHEREAS, the City of Saint Paul has awarded to Continental Cablevision of St. Paul, Inc. a franchise for the operation of a cable communications system in the City of Saint Paul (hereinafter referred to as "franchise"); and

WHEREAS, Continental Cablevision of St. Paul, Inc. is a wholly owned subsidiary of Continental Cablevision, Inc.; and

WHEREAS, the Indemnitee now requires that it be indemnified with respect to all claims and actions arising from the award of said franchise, the operation of said franchise, the enactment of any amendments to said franchise, and from all processes or procedures leading to the enactment of amendments to said franchise,

NOW, THEREFORE, in consideration of the foregoing premises and the mutual promises contained in this

agreement and in consideration of the payment to Indemnitor of One Dollar ($1.00) and other good and valuable consideration, the receipt of which is hereby acknowledged, the Indemnitor hereby agrees, at its sole cost and expense, to fully indemnify, defend and hold harmless the Indemnitee, its officers, boards, commissions, employees and agents, against any and all claims, suit, actions, liabilities and judgments for damages (including, but not limited to, expenses for reasonable legal fees and disbursements assumed or incurred by the Indemnitee in connection therewith) arising out of any claim wherein monetary damages of any kind, including punitive, or any other legal or equitable relief is sought as a result of the Indemnitee's cable communications franchising procedure and/or as a result of the awarding of the cable communications franchise and/or as a result of the Indemnitee's failure to award the franchise to any other person, partnership, corporation or other legal entity and/or as a result of the operation of the franchise by Indemnitor and/or as a result of the enactment of the franchise ordinance and/or any amendments to the franchise ordinance and/or as a result of any processes or procedures leading to the enactment of the franchise and/or any amendments thereto. Indemnitor also agrees to indemnify and hold Indemnitee, its officers, boards, commissions, employees and agents harmless from any monetary damages of any kind, including punitive, or other legal or equitable relief. The indemnification provided for herein shall not extend or apply to any acts of the Indemnitee constituting a violation or breach by the

Indemnitee of the contractual provisions of the franchise ordinance, unless such acts are the result of the order of a court or administrative agency or are caused by the acts of Indemnitor.

In the event that the Indemnitee awards any future cable communications franchise to a firm other than Continental Cablevision of St. Paul, Inc., then the Indemnitor agrees that it will not bring or cause to be brought, any action, suit or other proceeding claiming damages, or seeking any other relief against Indemnitee, its officers, boards, commissions, employees and agents for any award of a franchise made in conformity with Chapter 238 of the Minnesota Statutes, the Rules of the Minnesota Cable Communications Board and other applicable law.

The indemnitee shall give Continental Cablevision of St. Paul, Inc. reasonable written notice of the making of any claim or the commencement of any action, suit or other proceeding covered by this agreement. The Indemnitee shall cooperate with the Indemnitor in the defense of any such action, suit or other proceeding at the request of the Indemnitor. The Indemnitee shall consult with and obtain a concurrence of the Indemnitor, which shall not unreasonably be withheld, before entering into any settlement. The Indemnitee reserves the right to make a final determination. Nothing herein shall be deemed to prevent the Indemnitee from participating in the defense of any litigation by its own counsel at the Indemnitor's cost and expense. Such cost and expense shall include the reasonable value of any service rendered by the City Attorney or his assistants or any employee of the Indemnitee or its agents, including retained counsel,

and shall also include all costs associated with any litigation.

Indemnitor shall pay Indemnitee or its agents all costs and expenses of Indemnitee or its agents for claims arising under this agreement within thirty (30) days after a statement is tendered to Indemnitor by Indemnitee or its agents. Costs and expenses of Indemnitee or its agents are payable by the Indemnitor irrespective of the outcome of any litigation. Indemnitor shall also pay any monetary damages assessed against Indemnitee or reimburse Indemnitee for any monetary damages assessed against Indemnitee and paid by Indemnitee. In the event Indemnitee or its agents accrue or pay any monetary damages on behalf of Indemnitor, Indemnitor shall pay Indemnitee for all monetary damages, accrued or paid by indemnitee within thirty (30) days after a statement has been tendered to Indemnitor by Indemnitee or its agents. If Indemnitor fails to pay Indemnitee's monetary damages, costs and expenses within thirty (30) days after a statement is tendered, any unpaid balance will accrue interest at the maximum allowable interest rate provided by the law of the State of Minnesota. Indemnitor further agrees to pay Indemnitee for any costs and expenses associated with the collection of any monetary damages, costs and expenses not paid within thirty (30) days after a statement is tendered to Indemnitor by Indemnitee or its agents.

The provisions of this agreement shall be in addition to and independent of any other similar provision contained in the cable communications franchise ordinance to be enacted by the City of Saint Paul or any other agreement of the parties hereto. The provisions of this

agreement shall not be dependent or conditioned upon the validity of the cable communications franchise ordinance or on the validity of any of the procedures or agreements involved in the award or acceptance of the franchise, or amendments thereto, but shall be and remain a binding obligation of the parties hereto, even if the cable communications francise ordinance or the grant of the franchise is declared null and void in a legal or administrative proceeding. Nothing herein shall be construed to entitle Continental Cablevision of St. Paul, Inc. to any greater or different rights with respect to the franchise than such rights it may have by virtue of the cable communications franchise ordinance or any agreements involved in the award or acceptance of the franchise, or amendments thereto.

It is the purpose of this agreement to require Indemnitor to provide maximum indemnification to Indemnitee under the terms set out herein and, in the event of a dispute as to the meaning of this Indemnity Agreement, it shall be construed, to the greatest extent permitted by law, to provide for the indemnification of the Indemnitee by Indemnitor. This agreement shall be a binding obligation of and shall inure to the benefit of the parties hereto and their successors and assigns, if any.

Dated: November 14, 1983.

Approved as to form
and execution:

/s/ Edward P. Starr
Edward P. Starr
City Attorney

CONTINENTAL
CABLEVISION OF
ST. PAUL, INC.

By: /s/ A. Hostetter Jr.
Its PRESIDENT

CITY OF SAINT PAUL

By: /s/ George Latimer
Its Mayor

Attest:

/s/ Albert B. Olson
City Clerk

APPENDIX 18

EXCERPTS FROM MAGISTRATE'S ORDER OF AUGUST 13, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Nor-West Cable Communications,

Plaintiff,

v.

City of St. Paul, et al.,

Defendants.

Civil
3-83-1228

ORDER

This matter was before the undersigned United States Magistrate on June 3, 1987, upon plaintiff's motions to compel responses to interrogatories and to compel production of documents; upon defendants City of St. Paul's (City) and Continental Cablevision's (Continental) joint motion to compel answers to interrogatories and upon defendant Continental's motion to compel production of documents. The matter was also before the undersigned on July 8, 1987, and again on August 12, 1987, upon defendants' joint motion for sanctions. On June 3, 1987, plaintiff was represented by Ronald Haskvitz, Esq. and Stacy DeKalb, Esq.; the City was represented by Ernest Reveal, Esq. and Edward Starr, Esq.; Continental was represented by Robert Brunig, Esq. and Shawn Kennon, Esq. On July 8, 1987, plaintiff was represented by Ronald Haskvitz, Esq.; the City was represented by Ernest Reveal, Esq. and Kathleen Marron, Esq.; and Continental was represented by Robert Brunig, Esq. On August 12, 1987, plaintiff was represented by Harold Farrow, Esq.

and Ronald Haskvitz, Esq.; the City was represented by Ernest Reveal, Esq.

* * *

8. Defendants' motion for sanctions pursuant to Rule 37(b) is GRANTED;

9. Plaintiff, as a sanction pursuant to Rule 37(b) of the Federal Rules of Civil Procedure, shall pay to the City of St. Paul, the sum of $7,269,34, and to Continental the sum of $673.00, within ten (10) days from the date of this order;

10. Plaintiff is precluded from introducing at trial proof of any cable system or damages which does not fairly fall within the written expert submissions, which must be made in a timely fashion under the terms of the pretrial scheduling order; and

11. Plaintiff shall make its written expert submissions prior to the receipt of the documents from Continental which are the subject of Continental's motion now set for August 27, 1987. That motion hearing is therefore cancelled.

DATED: Aug 13, 1987.

/s/ Janice M. Symchych
JANICE M. SYMCHYCH
United States Magistrate

APPENDIX 19

ORDER OF FEB. 19, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership,

Plaintiff,

v.

CITY OF ST. PAUL, a city of the First Class; and KALBA-BOWEN ASSOCIATES, INC., a corporation,

Defendants,

and

CONTINENTAL CABLEVISION OF ST. PAUL, INC.,

Defendant In Intervention.

3-83 CIV 1228

ORDER

(Filed Feb. 19, 1987)

This matter comes before the court upon the appeal of plaintiff Norwest Cable Communications Partnership from the order of Magistrate Janice M. Symchych dated January 29, 1987. Specifically, plaintiff objects to that portion of the magistrate's order dealing with expert witnesses and the discovery of their opinions, particularly sections 3(d), (e) and (f).

The court is familiar with the action based upon prior motions that have been heard by and ruled upon by the undersigned. The court has reviewed the notice of appeal, plaintiff's memorandum in support of the appeal,

and the memorandum of defendant City of St. Paul in response.

The order appealed from is clearly a non-dispositive order which can be set aside only if it is "clearly erroneous or contrary to law." *See* 28 U.S.C. § 636(b)(1)(A), Fed. R. Civ. P. 72(a), and Rule 16(2) of the Local Rules of this district. Based upon its review of the materials submitted, the court is satisfied that the magistrate's order is neither clearly erroneous nor contrary to law.

Upon the foregoing,

IT IS ORDERED That the plaintiff's appeal from the order of the magistrate dated January 19, 1987, is denied and the order of the magistrate is in all things affirmed.

DATED: February 18, 1987.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U. S. District Judge

APPENDIX 20

ORDER OF SEPT. 18, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership,

Plaintiff,

v.

CITY OF ST. PAUL, a city of the First Class,

Defendant,

and

CONTINENTAL CABLEVISION OF ST. PAUL, INC.,

Defendant In Intervention.

3-83 CIV 1228

ORDER

The above-entitled matter comes before the court upon plaintiff's appeal of Magistrate Janice M. Symchych's order dated August 13, 1987. Specifically, plaintiff objects to the magistrate imposing sanctions totaling $7,942.34 for failing to adequately supplement plaintiff's interrogatory response regarding details of plaintiff's proposed cable system, and for precluding plaintiff from offering evidence at trial of any cable system or damages which does not fairly fall within the written submissions of plaintiff's experts on these subjects.

The magistrate's ruling can be set aside only if it is "clearly erroneous or contrary to law." 28 U.S.C.

§ 636(b)(1)(A); Fed. R. Civ. P. 72(a); Local Rule 16(2). In addition, magistrates are afforded, by this court and other courts, broad discretion in resolving discovery disputes. *See, e.g., Detection Systems, Inc. v. Pittway Corp.*, 96 F.R.D. 152, 154 (W.D.N.Y. 1982).

It is the court's opinion that the magistrate's order dated August 13, 1987, is neither clearly erroneous nor contrary to law.

Based upon the record as presently constituted and the foregoing discussion,

IT IS ORDERED That plaintiff's appeal from the order of the magistrate dated August 13, 1987, is denied and the order of the magistrate is in all things affirmed.

DATED: September 18, 1987.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U. S. District Judge

APPENDIX 21

LETTER FROM CONTINENTAL'S ATTORNEYS

HOGAN & HARTSON

A PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONS

COLUMBIA SQUARE
555 THIRTEENTH STREET NW
WASHINGTON, DC 20004-1109

202/637-6800

JAY E. RICKS

DIRECT DIAL 202/637-5600

March 24, 1988

8500 GREENSBORO DRIVE
McLEAN, VIRGINIA 22102
703/848-2600

RECEIVED
DATE 3/29/88
BY ERNEST I. REVEAL III
ROBINS, ZELLE, LARSON
& KAPLAN
6701 ROCKLEDGE DRIVE
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VIA FEDERAL EXPRESS

The Honorable Donald D. Alsop
United States District Court
316 North Robert
Federal Courts Building
St. Paul, Minnesota 55101

Re: Nor-West Cable v. City of Saint Paul and Continental Cablevision Civil No. 3-83-1228

Dear Judge Alsop:

This is to advise you that Continental Cablevision of St. Paul, Inc. ("Continental") does not intend to participate actively in the trial of the above-referenced action.

In its original September, 1983 complaint, plaintiff named as defendants the City of Saint Paul and the City's cable television consultant, Kalba-Bowen. Continental was not named as a defendant; however, among other things, the complaint requested the invalidation of the franchise awarded to Continental by the City of Saint Paul. In order to protect its interests in the franchise, Continental sought and obtained intervention as a defendant.

Plaintiff thereafter amended its complaint in March, 1984, but continued to limit its action against the City and the City's Consultant, Kalba-Bowen Associates, Inc. Thus, the introductory paragraph of the amended complaint states:

> Plaintiff, Nor-West Cable Communications Partnership, general partnership, brings this amended complaint against defendant, City of Saint Paul, a City of the First Class, against defendant Kalba-Bowen Associates, Inc., a corporation, requests a trial by jury, and alleges as follows:
>
> * * *

Continental is identified in paragraph 4 of the amended complaint as "defendant in intervention, Continental Cablevision of Saint Paul." and at all times in the amended complaint Continental is distinguished from the named "defendants" and is referred to as "defendant in intervention, Continental" or as "Continental."

For example, Paragraph 26 of the Amended Complaint states:

> Since the Mayor's purported veto, *defendants* have at all times refused to permit Nor-West to

> operate a cable television system within Saint Paul, and have instead entered into an agreement with *defendant in intervention, Continental Cablevision* whereby Continental will provide the only such system within the Saint Paul City limits. *Defendants* refuse to enter into any agreement with plaintiff, even on the same terms and conditions as they did with *Continental*. (Emphasis added.)

* * *

Finally, in the Civil Rights – First Amendment claim of the amended complaint, it is obvious that the term, "defendants" refers only to the City of Saint Paul and its consultant, Kalba Bowen.[1]

It is apparent therefore, that the amended complaint seeks no damages from Continental directly, and the only injunctive relief requested in the remaining counts of the amended complaint seeks a franchise from the City for plaintiff, but does not attempt to invalidate Continental's existing franchise.

As the undersigned counsel stated to the Court during the recent hearing on the motions for summary judgment, Continental has taken no position on the issue of whether the City of Saint Paul should or should not issue a cable television franchise to Nor-West.

Because of the circumstances noted above, Continental has concluded that its participation in the trial of this

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[1] See e.g., Par. 61 which states: "Each act taken by the defendants has been taken under color of governmental authority and right, and pursuant to an official policy or custom of such authority."

action is unnecessary, and therefore Continental does not intend to have counsel participate in the trial. If the Court prefers, Continental formally will withdraw as a party.

Respectfully,

/s/ Jay E. Ricks
Jay E. Ricks

Counsel for Continental
Cablevision of St. Paul, Inc.

JER/gh

cc: Magistrate Janice M. Symchych
All Counsel of Record

APPENDIX 22

EXCERPTS FROM REPORTERS TRANSCRIPT OF FEB. 19, 1988

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

----------x

NORWEST CABLE COMMUNICATIONS,

Plaintiff,

-vs- CV 3-82-1228

CITY OF ST. PAUL, ET AL.,

Defendants.

----------x

Motions in the above-entitled matter came on for hearing before the Honorable Donald D. Alsop, Chief Judge of the above Court, at St. Paul, Minhesota, on FEBRUARY 19, 1988 commencing at 9:30 a.m.

The following contains an excerpt of the Rule 16 Conference.

APPEARANCES:

HAROLD FARROW, ESQ
Appearing on behalf of Plaintiff

ERNEST I. REVEAL, ESQ
ROBERT A. BRUNIG, ESQ
JAY E. RICKS, ESQ
EDWARD STARR, ESQ
Appearing on behalf of Defendants.

[p. 2] WHEREUPON, the following proceedings were had:

* * * THE COURT: Tell me, Mr. Ricks' view – who is going to participate in this case? He is a defendant in intervention. What is his posture vis a vis trial?

MR. RICKS: Your Honor, there are no claims against our client.

THE COURT: I beg your pardon?

MR. RICKS: I say there are no claims against Continental in the complaint and therefore we defer to Mr. Reveal because the complaint is directed at the City.

THE COURT: You will be kind of second chairing?

MR. RICKS: We may or may not participate at all, Your Honor.

THE COURT: You don't care if they come or don't come?

MR. FARROW: That is exactly right.

THE COURT: My sense is only one lawyer would participate in such things as opening statement or cross-examination or the rest of it because your interests are virtually identical it seems to me – well, they are not virtually identical, but they are so close you are not adverse to be sure, and that is how you perceive it, Mr. Reveal?

MR. REVEAL: Yes, Your Honor.

THE COURT: You will be the trial counsel?

[p. 3] MR. REVEAL: I will be the trial counsel.

THE COURT: Mr. Brunig, are you going to be with us for eight weeks?

MR. BRUNIG: I don't know. I will defer on that.

THE COURT: How about you, Mr. Haskivitz? * * *

CERTIFIED: _____
L. P. LINDBERG

APPENDIX 23

EXCERPTS FROM TRIAL BRIEF

FARROW, SCHILDHAUSE & WILSON
Including A Professional Corporation
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Attorneys for Plaintiff
Nor-West Cable Communications Partnership

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
THIRD DISTRICT

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP, a general partnership,	)	Civ. File No.: 3-83-1228
Plaintiff,	)	
v.	)	PLAINTIFF'S TRIAL BRIEF
CITY OF SAINT PAUL, a City of the First Class; and KALBA-BOWEN ASSOCIATES, INC., a corporation,	)	

Defendants,	)
CONTINENTAL CABLEVISION OF SAINT PAUL, INC.,	)
Defendant In Intervention.	)

* * *

joined with the City in filing a motion to compel further answers (see Exhibit 5, Motion to Compel Further Answers), and later joined in seeking sanctions against Nor-West on the same issue (see Exhibit 6, Motion for Sanctions and Exhibit 7, Brunig Declaration re Attorney Fees). Clearly, Continental has throughout the case acted as a full defendant on the question of Nor-West's damages, and should not now be able to claim otherwise. If Continental has not been acting as a defendant in this matter, what business did it have in seeking such discovery from Nor-West? It appears that it was willing to take full advantage of its status as a party in the suit until it realized that that status included liability for damages.

As discussed in Point I, C, *supra*, Continental is jointly liable with the City for the damages claimed by Nor-West in this litigation. Continental chose to intervene in this suit, claiming that it had the right to do so. It has remained in the suit and actively participated for over four years of litigation. As an intervenor, it has assumed the status of full participant in the suit, taking part in discovery and law and motion matters as a full party. Continental cannot pick and choose the issues it wants to be involved with. See, e.g., *Sec. Industry v. Bd. of Gov. of Fed. Reserve System*, 628 F.Supp. 1438, 1440 (D.D.C. 1986).

By intervening, Continental made itself vulnerable to complete adjudication of the issues between it and Nor-West, including damages. Plaintiff respectfully submits that Continental does not have the right to withdraw from the case at this point any more than the City does, and asks that the Court so rule.

Moreover, such a withdrawal at this late date, after Continental has acted as a defendant for so long, would not only be contrary to the law regarding intervention, but would be highly prejudicial to Nor-West. Nor-West could have filed a separate suit against Continental if it had been aware that it would be unable to collect damages from Continental in the instant action. Additionally, if Continental does not have the status of a full defendant in the instant case, then it should not have had the right to take part in the discovery of Nor-West's case: not have deposed Nor-West's witnesses, nor asked interrogatories, nor sought documents – all of which caused extra work for Nor-West and its counsel. It should certainly not have been able to obtain sanctions from Nor-West for alleged discovery abuses. And it should not have been allowed to file separate briefs on the motion to dismiss, the motions for summary judgment, or any other motions in the case.

Plaintiff submits that once Continental intervened in this case, it obtained full status as a defendant and is liable for damages in this case jointly with the City. If the Court should allow Continental's withdrawal at this time, then, at the very least, Continental should be forced to pay Nor-West substantial sanctions to compensate for the large amount of attorney time spent on Continental's improper participation in the discovery, law and motion, and appellate phases of this litigation.

* * *

Serv. 742 (9th Cir. Feb. 2, 1988) (a copy of this opinion is filed herewith as Exhibit 10); see, e.g., *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 476-77 (8th Cir. 1987). The logic of the *Bose* duty of independent review, however, compels the conclusion that its scope is not limited to appellate courts, and that a trial court must also reexamine any jury conclusions restricting free speech interests.

Application of the *Bose* principle in this manner does not affect the proper allocation of issues between judge and jury, however, nor does it suggest that there is no longer a role for juries in constitutional litigation. On the contrary, juries have traditionally been regarded as the first guardians of fundamental freedoms. See Parker, *Free Expression and the Function of the Jury*, 65 Bost. U.L. Rev. 483, 550-56, particularly nn. 343 and 348 (1985). Judges properly step in only where misapprehensions appear to have influenced a jury to *limit* liberty. *Daily Herald, supra;* see also, generally, Parker, *supra*, 65 Bost. U.L. Rev. at 510 *et seq.* This principle should underlie all decisions regarding the role of judge and jury made here.

2. The logistics of trial where both court and jury serve as triers-of-fact

   a. Jury findings upholding plaintiff's First Amendment rights would be binding on the court when deciding the equitable remedies sought by plaintiff

When claims at law and in equity are joined and the legal claims are tried separately by a jury, the jury's verdict operates as a finding of fact binding on the trial court in its determination of the equitable claims. *Dybczak*

v. Tuskegee Institute, 737 F.2d 1524, 1526-27 (11th Cir. 1984) (denial of injunction based on jury finding of no racial discrimination).

The Seventh Amendment requires that when a cause of action involves legal and equitable claims, "only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959). This constitutional requirement ensures that the parties will not be barred from contesting those issues normally triable to a jury simply because the Court itself could have determined those issues while sitting in equity. By the same token, to the extent that the legal and equitable issues overlap, the Court when sitting in equity is bound by the jury's prior determination of the legal issues. See *Ingraham v. Wright*, 498 F.2d 248, 266 (5th Cir. 1974), *aff'd*, 525 F.2d 909 (5th Cir. 1970) (en banc), *aff'd*, 430 U.S. 651 (1977). As the Court observed in *Williams v. City of Valdosta*, 689 F.2d 964, 976 (11th Cir. 1982), "all findings necessarily made by the jury in awarding the verdict to [a party] are binding on the parties as well as on the trial court." Accord *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 690 (9th Cir. 1976) (instructions on remand that if jury determines no violation of Clayton Act §7, equitable relief precluded), *cert. denied*, 429 U.S. 940 (1976); see also *Bouchet v. National Urban League, Inc.*, 730 F.2d 799, 803 (D.C. Cir. 1984) (employment discrimination). Of course, the Court's exercise of its equitable powers must be viewed in light of the principles of *Bose*, discussed above, in the event of an adverse jury finding where, as here, First Amendment rights are in issue.

b. The "legal" and "equitable" issues presented in this case may be tried together before the jury, as may the adjudicative and constitutional facts

Where the "legal" and the "equitable" issues presented in a "mixed" (law and equity) case are not contradictory, and arise out of the same facts, they are generally tried together. 5 Moore, *Federal Practice* ¶39.12. It is permissible to try both legal and equitable issues to the jury. Their verdict is, as discussed above, binding on "legal" issues; it is deemed advisory on equitable issues. *Dellefield v. Blockdel Realty Co.*, 1 F.R.D. 689 (S.D. N.Y. 1941). Thus, a jury may be impanelled at the outset in "mixed" cases, and the evidence may be presented to court and jury simultaneously. *Simon v. Lovgren*, 368 F.Supp. 265, 269 (D. V.I. 1973). This procedure promotes judicial efficiency even as the Federal Rules provide the Court with flexibility to handle problems that may arise; for instance, the Court's view on whether a question is properly for the Court or the jury may change as things develop in the course of trial, and it may so rule on its own motion. *Ring v. Spina*, 166 F.2d 546, 550 (2d Cir. 1948). Should the Court find the evidence submitted to the jury and the facts found by them inadequate for its equitable rulings, it may take

* * *

APPENDIX 24

EXCERPTS FROM REPORTER'S TRANSCRIPT OF JUNE 2, 1988

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

----------x

NOR-WEST CABLE
COMMUNICATIONS,

Plaintiff,

CV 3-83-1228

-vs-

CITY OF ST. PAUL, ET AL.,

Defendants.

----------x

Trial in the above-entitled matter came on for hearing before the Honorable Donald D. Alsop, Chief Judge of the above Court, and a jury, at St. Paul, Minnesota, on APRIL 18, 1988, commencing at 9:00 a.m.

The following contains the charge conference in chambers on June 2, 1988

APPEARANCES:

HAROLD FARROW, ESQ
ROBERT BRAMSON, ESQ
RONALD HASKVITZ
STACEY DEKALB, ESQ
Appearing on behalf of Plaintiff

ERNEST I. REVEAL, ESQ
KATHLEEN MARRON
E. ANNE McKINSEY, ESQ
Appearing on behalf of Defendants.

* * *

[p. 3] page 1 and I got up to page 35 before I had to leave and come down here.

During the course of that I looked at the special verdict forms –

THE COURT: Right.

MR. FARROW: – so that to discuss the special verdict form finally without dealing with those, I don't think it will work.

I will tell you one major thought that I had is that your number 5, 6 and 7 don't belong to the jury; those are, first of all 5 and 6 –

THE COURT: Are you talking about the special verdict form?

MR. FARROW: Yes, sir, 5, 6 and 7. 5 and 6 are included within 7, I think, and they all deal, all three deal with the question of whether or not the Court is going to grant an injunction at this time and that is strictly a matter for the Court and the including of any facts involved in that, there is nothing that the jury can do for that matter that would amount to anything that would be binding on the Court so the only potential it would have would be to create a conflict between an advisory finding of the jury and the finding by the Court.

THE COURT: You don't think that their financial ability or their technical capability or their willingness [p. 4] to whether they are or are not a First Amendment speaker entitled to protection under the First Amendment?

MR. FARROW: We have to deal with today so I am talking about today.

THE COURT: I am talking about now.

MR. FARROW: That deals with, I think, everybody is a First Amendment speaker and every could-be or a would-be publisher, whether or not they would be entitled to an injunction from the Court at this time might well depend upon the Court's belief as to whether or not they had the ability and the intent to follow through.

But that would be a decision for the Court in connection with deciding whether or not to grant an injunction.

THE COURT: All right, I hear what you are saying. Anything more you want to –

MR. FARROW: Yeah –

THE COURT: – my sense is I can't talk about jury instructions unless I get a verdict, a special verdict put together. I am willing to try it the other way but my own experience is if we can't agree on how to submit the case – I am not saying we can't agree – but if we can't get the way the case will be submitted we don't get very far talking about jury instructions.

But I am willing to try it the other way.

[p. 5] MR. FARROW: If I can, if we start with your form what you have done is the first several forms dealing with standard –

THE COURT: Boilerplates, right. We are going to go through my form a page at a time; I can tell you that.

MR. FARROW: As you go through those forms in a little while you get to statement of claims –

THE COURT: Yes, sir.

MR. FARROW: When you get to the statement of claims that is where the major problems arise and those major problems will affect how you are going to make adjustments, if any, to your verdict forms.

THE COURT: I don't look at it that way, but go ahead, tell me what you want to do.

MR. FARROW: Well, let me tell you that the most significant single problem I see in there in your statement of claims, is that you assume in there and you assume it in your question that if Nor-West was to be – was to build a cable television system in 1983 or '84 that it had to build exactly what Continental was going to build.

Now if you look at the statement of claims, as you go along you are repeating, you are dealing with facts and you get up to page 10 and you talk about the veto on August 2nd, the bottom of that main paragraph, then you switch to November 1983 and you to the –

[p. 6] THE COURT: Look, I will go through those with you chapter, page and verse on what you have

got, but I don't want to start doing that now. You told me conceptually you feel that we have gotten off base, as you perceive it?

MR. FARROW: I am trying – I am a little slow getting it out – but I am trying – what I am trying to say to you is that when Nor-West got the veto and filed its complaint it raised the issue of the lawfulness of the provisions of the franchise and of the provisions of the RFP, and as of the time it was asking for the right to go visit, which was in September.

There was no franchise with Continental, that was a neogitated agreement between the City and Continental that came in November and in December, for example, when Nor-West repeated its position, and it did it with the two letters December 5 and December 28, one to the City and one to Reveal, it clearly said that it would live by all lawful provisions of the RFP and of any franchise issued.

Now lawful positions, even under existing state and federal provisions at that time, I think that is a year before the federal provisions, but under the state provisions, a lawful provision could be a franchise contract, a negotiated franchise contract or a permit or a license done pursuant to lawful police power so that one of the critical problems that we see with your instructions and your questions is the [p. 7] assumption number one Nor-West has to build, be prepared to build exactly the same –

THE COURT: When you say exactly the same, are you talking about full city coverage, is that what you are talking about?

MR. FARROW: Yes, I am talking about the underground downtown; I am talking about the institutional loop; I am talking about dual cable; I am talking about two miles or whatever it was, the amount of money going to access people, I am talking about all of the things that could contractually be subject matter of a negotiated agreement between Continental and the City which would, we think, clearly the City did not have the ability to require as a matter of police power.

THE COURT: How do you want to submit it?

MR. FARROW: What I have done is I have done some editing to say that we were prepared to build a cable system in the city –

THE COURT: That is a question, in competition with Continental?

MR. FARROW: Certainly they had to be prepared to compete with Continental and they had to be prepared to do that in September or August.

THE COURT: Take me through the questions and tell me how the question does not address what you want it to address as for instance question one?

* * *

APPENDIX 25

EXCERPTS FROM REPORTERS' TRANSCRIPT OF JUNE 3, 1988

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

----------x

NOR-WEST CABLE COMMUNICATIONS,

Plaintiff,

CV 3-83-1228

-vs-

CITY OF ST. PAUL, ET AL.,

Defendants.

----------x

Trial in the above-entitled matter came on for hearing before the Honorable Donald D. Alsop, Chief Judge of the above Court, and a jury, at St. Paul, Minnesota, on APRIL 18, 1988, commencing at 9:00 a.m.

The following contains the in chambers charge conference on June 3, 1988

APPEARANCES:

HAROLD FARROW, ESQ
ROBERT BRAMSON, ESQ
RONALD HASKVITZ
STACEY DEKALB, ESQ
Appearing on behalf of Plaintiff

ERNEST I. REVEAL, ESQ
KATHLEEN MARRON
E. ANNE McKINSEY, ESQ
Appearing on behalf of Defendants.

[p. 15]8, I don't see any changes.

9, I don't – whoops, insert from 9-A, what is that, that is your note, I guess.

MR. FARROW: That is our definitions.

THE COURT: There you go, for the purpose of this case a franchise shall mean – means any authorization granted by a municipality in the form of a franchise, privilege, permit, license or other municipal authorization to construct, operate, maintain or manage a cable communications system.

That comes from Minnesota statutes?

MR. FARROW: Yes, Your Honor.

MR. REVEAL: Your Honor, ondoubtedly that is the correct definition. For the life of me I don't know why the jury has to know what the definition of a franchise is under Minnesota law.

THE COURT: Why do they, for general purposes?

MR. FARROW: No, sir, that is what we are asking for in our complaint and asking for in our letters of December; we were asking for franchises which we would obey all the lawful provisions of and we think that the franchise that they issued to Continental is an unlawful one or contained many unlawful provisions.

THE COURT: That gets us tc one of the real fights you have in this case and that is what are you asking for and what are you wanting to get.

[p. 16] MR. FARROW: That is right.

THE COURT: And there is no way that this jury is going to be able to decide what is a – what kind of a request is a lawful request because that is what the lawsuit, is all about.

So whether you are going to argue to the jury that all you asked for was what Continental got or all lawful provisions, they are not going to know what that means.

MR. FARROW: We certainly want to be in a position to argue to the jury that the concept of conditioning permission to enter the market, unless you go out and duplicate the institutional loop, for example, or unless you agree to furnish the city hall with a studio and free money to put them on television, or unless you agree to surrender control of your own channels is something that is not lawful.

THE COURT: And the jury is not going to be able to decide that.

MR. FARROW: It is something that would be unreasonable to be demanded. I am not going to suggest the jury is going to decide the law, and maybe when we say that, when we argue the case I really have to pay attention and try not to argue it as a matter of law, but as a matter of practicality, as a matter of reason, and as a matter of justification. Certainly we ought to be able to do that.

THE COURT: Ought to be able to do what?

[p. 17] MR. FARROW: We have to be able to point out to the jury what would be the true assinity of the City saying okay, you have to come in here but what

you have to do is you have to duplicate everything we negotiated for with Continental.

THE COURT: What has that got to do with what the jury has to decide?

MR. FARROW: They have to decide the question about whether or not – they are going to answer the questions with that –

THE COURT: The problem is he is going to say that you wanted one thing and you are going to say you wanted something else and nowhere is the jury as such in the way we have got it put together, asked to decide what it is you really wanted.

Ask Deb to bring that in, that redraft.

MS. MAKINEN: The new questions?

THE COURT: Have you got that?

MS. MAKINEN: The new copy is on top.

THE COURT: I don't have any problem with defining franchise, to tell you the truth, but I have some problem as to what is going to happen down the road, that is what I have the problem with.

What are we going to do with it? I don't have a problem putting it in, I think giving them a definition of a [p. 18] franchise is fine, it may be helpful to them, but – I am going to make a phone call. I will make a phone call while you are doing that, reading those.

Compare that with the verdict forms 1, 2, 3.

I don't claim any pride of authorship. That is an effort to try to do what I talked to you about yesterday,

namely you fight it out with the jury as to what system you want to put in.

MR. FARROW: I have no problem with it, Your Honor. I have a problem with the phraseology.

THE COURT: I am not too proud of the phraseology, if you can phrase it better.

MR. FARROW: I think what I am suggesting –

THE COURT: I am sure it can be phrased better.

MR. FARROW: I think your clause went in in a different place then where you meant it to.

THE COURT: I am not sure it completely solves the problem, and if plaintiff thinks it is okay I am sure the defendant won't or vice versa.

What did I do with the darn thing?

MS. MAKINEN: Judge, by your telephone.

MR. REVEAL: Your Honor, we don't have an objection to this. Mr. Farrow and I may even not disagree as to perhaps the rephrasing of it. I think the Court has put its finger on exactly the issue between us which harkens back to

* * *

[p. 21] MR. FARROW: I thank you for your efforts.

THE COURT: – did Nor-West have the financial ability necessary to design, construct and operate in St. Paul – you want to put the 1983 right there?

MR. FARROW: The cable system it requested permission for in 1983.

THE COURT: Well, do you want to take out the "in St. Paul"?

MR. FARROW: Then you can leave it in St. Paul if you want to.

THE COURT: Where do you want to put in 1983?

MR. FARROW: I want to put the whole phrase, the cable television system it requested permission for in 1983, put it right behind the word operate like this.

THE COURT: Wait a minute, operate the cable television system it requested permission for in 1983 in competition with Continental Cablevision in St. Paul?

MR. FARROW: Okay.

THE COURT: We have to look at it.

Did Nor-West have the financial ability necessary to design, construct and operate, in competition with Continental Cablevision in St. Paul the cable television system it requested permission for – wait a minute, where do you want the 1983?

MR. FARROW: That is what you just read, that is [p. 22] where you started from.

THE COURT: Wait a minute now, you want the 1983 after operate?

MR. FARROW: Yeah, you have the same thing we have.

THE COURT: Let's just try it once; did Nor-West have the financial ability necessary to design, construct

and operate in 1983 in competition with Continental Cablevision in St. Paul, the cable television system it requested permission for or do you want the 1983 at the end?

MR. FARROW: The way you just read it, it is all right too.

THE COURT: Mr. Bramson, let's hear from you. I think you are smarter than any of us except Kathleen Marron.

MR. BRAMSON: What is the original suggestion, did Nor-West have the financial ability necessary to design, construct and operate the cable television system it requested permission for in 1983 in competition with Continental Cablevision in St. Paul?

THE COURT: Read it once more, I don't know where the hell I am at now.

MR. BRAMSON: Did Nor-West have the financial ability, necessary to design, construct and operate the cable television system it requested permission for in 1983 in competition with Continental Cablevision in St. Paul.

THE COURT: Is that how you have it, Ms. Marron?

* * *

[p. 34] on page 12 at the bottom.

Okay, now I am on 13, I think and I think I should add, "And in competition with Continental Cablevision on the top –

MR. FARROW: That is –

MR. BRAMSON: Your Honor, you are on the top line?

THE COURT: Yeah. Have you got a copy of theirs?

MR. BRAMSON: Yeah.

THE COURT: Theirs is pink.

MR. BRAMSON: Two different places.

THE COURT: And I think, "In competition with" on the fourth line.

MR. FARROW: Right.

THE COURT: 'Build and operate", have we got those, do we need those, Christy?

Have you got a copy?

MS. Makinen: Yes, we do.

THE COURT: Do we need that? I think, "To build and operate," is okay.

MR. FARROW: After the word system is where we get in trouble.

THE COURT: System is no problem; you don't like on the same conditions as the franchise awarded to cablevision?

MR. BRAMSON: We have some proposed language, Your Honor.

[p. 35] THE COURT: That gets us back to our new verdict form, really. Why don't we leave that open for the moment.

MR. BRAMSON: This is our claim after all.

THE COURT: I want to cry is what I want to do.

"While obeying all lawful requirements imposed upon it by the City on the same conditions as a franchise awarded to cablevision"?

MR. FARROW: You can't do both of that.

THE COURT: But I can put it as you requested it.

MR. FARROW: As we requested it?

THE COURT: That is where we are going to end up. I think I will leave that with both of you up in the air at the moment, but don't let me forget coming back to it. If we change the verdict form we have to change this.

We will have to look at that all the way through is what we have to do.

All right, now I am on 13.

MS. MARRON: Just to finish up with our suggestions, Your Honor, the only other change we would suggest is at the bottom of page 13, four lines from the bottom. I think this is an affirmative defense so it is not a matter of denying, which is why we made the change, the City also asserts instead of the word "denies" that Nor-West had the technical capability, because that was our assertion. This is talking about our affirmative defenses.

* * *

[p. 64] MS. MCKINSEY: "In competition" needs to go in there too.

THE COURT: All right, in competition with Continental Cablevision, period.

Now –

MR. REVEAL: Your Honor, we leave that sentence? If the Court is going to have it worded in terms of ability to purchase, obtain, et cetera, then we would ask that the original phraseology about financial commitments or ability be left in as the Court originally framed it.

THE COURT: All right. You are the one that asked me to take it out.

MR. REVEAL: That is correct, in anticipation of the other changes being made.

THE COURT: All right. We have it back in, it is commitment or ability.

Now this gets us to the hub of where we were at again where the charge says such a cable system must be based on substantially the same terms and with substantially the same conditions as the franchise, as the Continental Cablevision – awarded Continental Cablevision in late '83.

The plaintiff wants all of that out and the defendant wants it in.

MR. FARROW: I thought we agreed upon – agreed upon jury battleground to take this out.

[p. 65] THE COURT: Yes, it is, and the question is do we want to fuss with this now or do you want to wait until after lunch when we – I have got or have I got – is she working on that?

MS. MAKINEN: Yes, she is.

THE COURT: I am going to have the six questions that relate to that. I have got them redone and what I want to do is send the noon hour or as much time as you need, maybe now is the time, and look at those together and see if that is the way we are going to submit it over whoever's objection, whoever wants to make the objection, but I want you to look at it in writing.

MS. MCKINSEY: Maybe we should.

MR. FARROW: We will look again. I thought we looked at it already.

THE COURT: Well, it involves six questions and if you want to take ten minutes and look at it and compare it with what is in there, and wait a minute, this is the only one, where is 4, 5, 6 – or 5, 6, 7 – maybe that would be the most expeditious way to do it, and see if we can agree that this is the verdict form and if it is then when we go through this we can, God willing, incorporate it.

Let's have at it.

I am going to get out of here while you look at what is now a fourth draft of the verdict form, changing six

* * *

[p. 103] MR. BRAMSON: I was going to say at a minimum instead of "figure" you have to say gross asset value because they will not know what this figure is.

THE COURT: No, no, there is no way I can put it there.

(NOON RECESS TAKEN.)

WHEREUPON, the following proceedings were had:

THE COURT: Okay, here we go, you have looked at the fifth draft of the proposed changes to the verdict form which would change verdict form 3.

Plaintiffs, how how do you like them reserving all other objections?

MR. FARROW: One, two, three of the new form on two I would say was Nor-West capable of providing the technical capability, not plural but singular, necessary to design, construct and operate.

THE COURT: Other than that are you comfortable with them?

MR. FARROW: I am as comfortable as I am going to be.

* * *

[p. 160] think there are certain limits to how much endurance, namely Larry's and Christy's and yours and mine and all of us –

MR. FARROW: All right.

THE COURT: I would just screw up the weekend, I just can't do it this weekend.

MR. FARROW: Is there some way we could, how do you say it now, without limiting my own rights, is

there some way we can lock down something so that we don't start over again from scratch on Monday?

THE COURT: We are not going to start over from scratch, that is all there is to it. We are at the point where you folks have had at me for two days and you have made your record, everybody has reserved all of their objections and the nitpicking is over and we are just going to finish it Monday morning, that is all.

I think we are at the point where we can.

I want to go over what I have left here as to what I call my laundry list so I know what I am going to be addressing between now and Monday. You are going to be going over – I think we are done with the verdict forms as far as I am concerned; we are done with it, and that helps you with your closing argument?

MR. REVEAL: It does.

THE COURT: And you are going to have these drafts to go through and we are done dotting i's and crossing t's.

[p. 161] If we have made mistakes we would like to know about it because it is going to the jury and I want to know what else I have left to do in substance here and the one thing that I am concerned about is your comparable business that you have given me, comparable values, I have to look at that.

Now I don't know that you can tell the – you sure as hell can tell the jury how you want them to answer the questions; I want you to do that, that is your choice, but I have had lawyers argue a case for four hours and when I got around to telling him he had about ten minutes left he

had a 20-page or a 20-question verdict form and he started to tell them how he wanted them to answer the questions.

So obviously you are entitled to tell them how to answer the question. I don't know if you can tell them precisely what the effect of their verdict is going to be, vis-a-vis my balancing, because I don't think you know. I don't think any of us know.

So you can tell them what I am going to do and you can tell them about the alternative damage thing if you want to as far as I am concerned, that is it, and alternative measure, you don't want both, and beyond that I don't see how you can argue the effect of the verdict other than what I have just described.

MR. REVEAL: I don't know how.

THE COURT: Maybe you don't even want to, I don't

* * *

[p. 174] squib, I think, did you see that?

I don't know, did you generate that?

MS. NAKINEN: Yes.

THE COURT: Do any of you feel you need it?

MR. BRAMSON: I think it goes to the question of what language we are going to use throughout the charge instead of, "on the same terms and conditions as Continental."

MS. NAKINEN: That is right.

THE COURT: You are going to look at that between now and Monday?

MR. FARROW: We will look now if you would like.

We think if you take the word which was – appears at the end of the second line and put in "what" that is fine, you insert this anyplace in the main charge where you are talking about those terms and the same terms and conditions.

MR. REVEAL: I had not understood that we crossed that bridge in terms of deciding to substitute something in lieu of what is currently in the charge.

THE COURT: We hadn't but we will have to make changes based upon the changes we made in 1, 2, 3; 5, 6, 7 or whatever those numbers are, I think.

MR. REVEAL: I am not sure in my own mind that that follows. The only evidence that I know of is as has been set forth in the Court's original charge as to what was requested and you have taken the verbatim language out of [p. 175] Mr. Farrow's letter.

THE COURT: Well –

MR. REVEAL: If he wants to argue that the effect of that is something other than we argue the effect of it is, that is his prerogative.

THE COURT: The dispute is what kind of a system he requested.

MR. REVEAL: That is right.

THE COURT: Is that all that says – they, the jury, have to decide what kind of a system that was.

MR. REVEAL: The system, to me, the best evidence would be the letter itself.

THE COURT: Why don't you argue that to the jury. The question is what do I tell them in the charge. We have gone this route and this is where I thought we ended up as to how we are going to resolve it instead of saying a system or the system and I am going to let the jury decide which system it was and whether they had the financial ability to build that system.

He is going to argue that it is something less than what you are going to argue that it is.

MR. REVEAL: Of that I had no doubt. I guess I had not understood that they were making that decision. I guess I had understood Mr. Farrow's comment – well, if you want to argue the effect of that is they would have to build on identical [p. 176] terms and conditions and we think that makes the ordinance and regulatory ordinance facially unconstitutional and that is the fight we have to take on and I said fine, let's take that fight on but if we are – at this juncture our position is that the instruction should be as it is contained in the charge now.

THE COURT: It is contained throughout, I think, as you say, contained in the charge. I don't know what you are referring to.

MR. REVEAL: Just generally speaking, the language about substantially the same terms and conditions.

MR. FARROW: I was just going to say the first time it appears is on page 13 that I noticed and we have

indicated consistently from the beginning we have objected to this language and that has been the subject matter of dispute about what language goes in thee because that is saying – or some different language, and I thought what we were trying to do is say okay, let's stop fighting about the language in the charge and the Court is going to eliminate that and let us come up with some language and fight it out with the jury.

That has been my understanding and I think it must have – it might have been clear, shall we say. But this phrase, "on substantially the same terms and substantially the same conditions –"

THE COURT: Okay.

[p. 177] MR. FARROW: In competition with Continental, that presents the whole argument. If the Court charged that at that stage, that is what we are going to hand the jury and I am back to June 30 dealing with outrageous demand of different sets of people –

THE COURT: I agree you have got – that is the way we intended to resolve that, the jury would decide what system it is that they sought permission to build.

MR. REVEAL: I understand the Court and I apologize if I misunderstood.

THE COURT: I think we are all on the same wavelength, I think we are all getting tired, is what our problem is.

You are going to try to see where this works in.

You folks are going to try to see where it works in and I will try to see where it works in between now and

Monday morning and it is either this or something like this.

All right, I think that is all I have for you. Have you got more, plaintiff?

MR. FARROW: To change the subject, a couple of small matters; we have redacted the sentence from the famous smoking gun but we have also done it in two ways, we would like to take the offensive words out. The other one we are taking the sentence out as the Court instructed.

THE COURT: Take the sentence out?

* * *

APPENDIX 26
Excerpts From Reporter's
Transcript Of June 6, 1988

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

---x

NOR-WEST CABLE
COMMUNICATIONS,

CV 3-83-1228

Plaintiff,

-vs-

CITY OF ST. PAUL, ET AL.,

Defendants.

---x

Trial in the above-entitled matter came on for hearing before the Honorable Donald D. Alsop, Chief Judge of the above Court, and a jury, at St. Paul, Minnesota, on APRIL 18, 1988, commencing at 9:00 a.m.

The following contains the in chambers charge conference on June 6, 1988

APPEARANCES:

HAROLD FARROW, ESQ
ROBERT BRAMSON, ESQ
RONALD HASKVITZ
STACEY DEKALB, ESQ
Appearing on behalf of Plaintiff

ERNEST I. REVEAL, ESQ
KATHLEEN MARRON
E. ANNE McKINSEY, ESQ
Appearing on behalf of Defendants.

[p. 3] but the franchise ordinance agreement, if you will, was not until November.

MR. REVEAL: No question about that.

THE COURT: That is where you get into the problem.

MR. REVEAL: I was struggling with that. The concern was confusion on the part of the jurors since they would say what does August 2nd have to do with anything.

THE COURT: We talked about that and you will have to tell them, I guess.

On the second page, in order to track, Item 6, the technical capability, add the word necessary so it tracks with question 2.

MS. MARRON: I am sorry, which one is that?

THE COURT: Item 6, the second line, the second capabilities and then it reads the same as question 2.

Now I think that the defendants' proposals on 8 and 9 are not substantive, but are, I think they read easier, it seems to me and gets us back to the cable system and I would agree to those, it seems to me they don't change the substance of it at all.

MR. FARROW: Well, you know, everytime we say "the" instead of a "a" we bring up the whole question again – what about in 6, I want to leave 6 the way it was with respect to the "the" and "a".

[p. 4] THE COURT: I would put "the" in 6 too, that is the way we are going to submit the case and it is so ordered.

I don't think that their changes to 8 and 9 proposals, I think they track with the way we put it in the charge and I think they make it read better.

MR. FARROW: Well, okay, then I wasn't going to ask any changes, I was going to try to leave it the way it is.

So long as we are going to change it I want you to look at number 9, when you talk about four-year delay, it is now four years nine months.

THE COURT: I agree. I think I can stick the four years due to the delay of its entry into the market. I will do so.

Now let me see, there are no changes on 1.

Okay, anything further on the verdict?

MR. BRAMSON: We did have one comment, I am not sure whether the Court has already ruledon this or not, if you have then we will just make it for the record.

As far as the phrasing of more than one in numbers 12 through I guess – 11 through 15, in rereading them, it again indicated to us that written that way the jury apparently – if the jury feels that for example on 13 that the installation of two systems would not cause substantial environmental problems but the installation of seven systems would, they are supposed to answer that question yes as it is worded and to us

* * *

[p. 11] ordinance of the City of St. Paul itself complied with federal law or the United States Constitution, is correct.

Anything else on 12?

MS. MARRON: No.

THE COURT: None.

13, I have got this in that long middle paragraph, the first full paragraph down at the bottom, "If given the opportunity it would in fact build and operate a cable television system under the terms and conditions it described in its requests and operate its system in competition with Continental Cablevision."

I will read it again: "Further, the plaintiff claims that both in 1983 and at the present, if given the opportunity, it would in fact build and operate a cable television system under the terms and conditions it described in its requests and operate its system in competition with Continental Cablevision."

MS. MARRSON: Your Honor, we would have a couple of other changes on their, on that same sentence that you just read "a" should be "the".

THE COURT: I am sorry?

MS. MARRON: The word "a" cable television system under terms and conditions, should be "the" cable television system to be consistent with the special verdict form.

THE COURT: Right.

[p. 12] MS. MARRSON: The same change would be further up in that same paragraph, about in the middle there it says the plaintiff claims in 1983 it was and now is ready, willing and able to design, construct and operate "the" instead of "a" cable television system and, after system, insert, which it requested permission to build in competition with –

THE COURT: The cable television system it requested to build?

MS. MARRON: Right.

THE COURT: Gotcha.

MR. BRAMSON: Our only objection to that language would be a continuing objection to an overemphasis of the point.

THE COURT: All right.

MR. BRAMSON: At the bottom of the page, the very last sentence where it says as a result Nor-West claims money damages –

THE COURT: Strike the "with"?

MR. BRAMSON: And we suggest, request from the Court –

THE COURT: As a result Nor-West claims money damages and requests from the Court an injunction ordering the City to refrain – okay. Then I am done on 13?

MR. BRAMSON: Yes.

THE COURT: 14, the first full paragraph, seven lines [p. 13] down, the City also asserts that Nor-West

was not capable of, adding also between City and asserts, was between Nor-West and not, and "of" between cable and appeared. That is all I have on 14.

MS. MARRON: We would make the same changes to make it consistent with the special verdict form in the second sentence of the first full paragraph, the one that begins the City asserts that Nor-West at that time lacked the financial ability necessary to design, construct and operate "the" instead of "a" cable television system and then insert which it requested permission to build in competition –

THE COURT: The City asserts that Nor-West at the time lacked, is that where you are?

MS. MARRON: Yes.

THE COURT: Lacked the financial ability necessary to design, construct and operate the cable television system?

MS. MARRON: Right.

THE COURT: It seems to me that I get to that. I don't care if you put that in there, but we sure get it later on, it seems to me.

All right, a television cable system it – it requested – why don't we say the cable television system it requested?

MS. MARRON: Yes.

THE COURT: In competition with Continental Cable-

* * *

[p. 23] MR. BRAMSON: No.

MS. MARRON: No.

THE COURT: Now 24, have you got any suggestions on that one?

MS. MARRON: Yes, Your Honor, starting with the second to the last line, the first paragraph, operate the instead of "a".

THE COURT: Just operate?

MS. MARRON: It starts with the sentence to be ready, willing and able Nor-West must –

THE COURT: I understand that, but that is in the generic sense and I am sure I pick it up in the balance of, in the next paragraph where I say, where do I say the parties can't agree, didn't we put that in, Christy?

MR. BRAMSON: The cable system of the plaintiff would have to, the seventh line down in the last paragraph.

THE COURT: Yeah, the cable system the plaintiff would have to design, construct and operate is in dispute between the parties. That I am satisfied is the paragraph you made reference to talking about all three questions.

What are they, 6, 7, 8 or, no, 1, 2, 3, I think.

MS. MARRON: Yes.

THE COURT: The first three question you must answer relate to whether Nor-West was ready, willing

and able to be a cable operator which is what we have now changed the [p. 24] first element to be. In other words, was the plaintiff a cable operator who would be entitled to First Amendment protection, to be ready, willing and able Nor-West must have possessed the financial ability, technical capability, and the intent necessary to design, construct and operate a cable television system in competition with Continental in St. Paul.

Now you want to put the cable television system –

MS. MARRON: The cable television system.

THE COURT: I will leave it the way it is there and tell them in the next paragraph that you don't agree as to what cable television system that is and they have to decide in answering question 1 what that is.

I think that more properly frames it.

MR. FARROW: Yes.

MS. MARRON: Okay.

THE COURT: Anything more on the first full paragraph?

MS. MARRON: Not on the first one, Your Honor.

THE COURT: Let's go to the second full paragraph.

MS. MARRON: The second one, the fifth line down, we for the record, we would make the same request that "a" be changed to "the" and cable television system should have added, which it requested permission to build.

THE COURT: Well, I am going to leave it the way it is [p. 25] because the very next sentence says that the cable system the plaintiff would have to design, construct and operate is in dispute.

You as a jury must determine what system the plaintiff had requested after August 2 and determine whether the plaintiff had the necessary finances to operate that cable television system.

MS. MARRON: Okay, with respect to that statement right there, Your Honor, you as a jury, that sentence there?

THE COURT: Yes.

MS. MARRON: We have two objections in the alternative. One is the one Mr. Reveal raised earlier, instead of August 2nd, 1983 we would suggest the words be inserted the City's award of a franchise to Continental and I understand the Court declined that.

THE COURT: I wouldn't decline it, I don't like August 2nd any better than you do, but it is correct and accurate.

You folks will have to tell them the significance of that when you argue. If you could come up with some other date that is more significant between the two of you – because it is not as you suggest after the award of the franchise because the plaintiffs' position is that it is in September and the franchise agreement or ordinance or whatever they call it was not entered into until November as I

* * *

[p. 32] MS. MARRON: Okay, on the fifth and sixth lines now we are talking about the new questions here, 5, 6, 7, it is the first time we are talking about it again so I would suggest that we change a cable television to read the cable television system Nor-West requested permission to build in competition with Continental.

THE COURT: This is the same problem we went through in connection with 1, 2, 3. I will leave it the way it is. The next sentence says the plaintiff – the system the plaintiff proposes to design, build – design – is in dispute, you must determine what system the plaintiff now proposes.

MS. MARRON: With that in mind, Your Honor, the language that you just read, we would suggest that the tense should be different, instead of proposes it should be proposed and instead of plaintiff now proposes, plaintiff proposed since I think the only requests were in 1983.

THE COURT: You as a jury must determine what system the plaintiff proposed?

MR. BRAMSON: Your Honor, we would object to that and we think it is another argument, issue of argument for the jury. That is all they requested, that is all they requested, they are free to argue that.

THE COURT: I think that is right. You have the special interrogatories that you offered that says what system do you now propose to build and I read their answers and that

* * *

APPENDIX 27

LETTERS FROM CONTINENTAL

PLAINTIFF'S EXHIBIT 9170

Continental Cablevision
of Saint Paul, Inc.

December 23, 1986

Ms. Linda Camp
Office of Cable Communications
901 Commerce Building
8 East 4th Street
St. Paul, MN 55101

Dear Linda:

Please find enclosed, estimates on the costs involved in bringing cable to your offices. This is meant as no more than information to base further discussions on.

As you can see this is no easy task nor will it be inexpensive. Please look the materials over and feel free to give myself or Jim Fenton a call.

Sincerely,

/s/ Randall
Randall W. Coleman
Regional Manager

RWC/amk

Enclosures

Union Depot Place • 214 E. Fourth Street
St. Paul, MN 55101 • Telephone: (612) (illegible)

APPENDIX 28

LETTERS FROM CITY HALL

CITY OF SAINT PAUL
DEPARTMENT OF FINANCE
AND MANAGEMENT SERVICES

[SEAL]

GEORGE LATIMER
MAYOR

LINDA J. CAMP

Office of Cable Communications
901 Commerce Building
8 East 4th Street
Saint Paul, Minnesota 55101

(612)298-5095

TO: Randall Coleman
Continental Cablevision

FROM: Linda Camp /s/ Linda Camp
Cable Communications Officer

DATE: March 5, 1987

Attached is a draft of a proposed agreement to allow Continental to install cable in the Water Utilities Tunnels between City Hall and the Annex. Use of the tunnel is necessary to economically and easily complete the installation of cable in the City Hall Annex.

I discussed this briefly with Jane McPeak of the City Attorney's Office. Her view was that, even though the City will be the sole user of the cable, since Continental will own it, the company will have to be a party to the agreement.

I'd appreciate your comments as quickly as possible so we can place this on the Water Board Agenda later this month.

cc: Jim Graupman, Water Utility
Paul McCloskey, City Attorney's Office

PLAINTIFF'S EXHIBIT 1021

CITY OF SAINT PAUL
DEPARTMENT OF FINANCE
AND MANAGEMENT SERVICES

[SEAL]

GEORGE LATIMER
MAYOR

LINDA J. CAMP

Office of Cable Communications
901 Commerce Building
8 East 4th Street
Saint Paul, Minnesota 55101

(612)298-5095

TO: Don Sobania

FROM: Linda J. Camp /s/ Linda J. Camp
Cable Communications Officer

DATE: April 8, 1987

This is to follow up your recent discussions with Pam Mendez about gaining access to a City owned conduit beneath Fourth Street. Pam and I have been working with staff from Continental Cablevision on installing cable in City buildings. For several months we have been trying to find a way to provide service to the City units located in the Commerce Building. All of the options we have looked at thus far involve routing the cable through the Radisson Hotel or through other office buildings adjacent to the Commerce Building. These approaches are very costly and we have not yet been able to get right of entry agreements from building owners involved.

It is my understanding that the City owns a conduit that runs from the Annex to the basement of the Commerce Building that has some space available. This would

accomodate our needs very well and be installed very quickly and inexpensively. Therefore, I am officially requesting permission for Continental Cablevision to gain access to this conduit for purposes of installing cable in the Commerce Building.

We are in the process of doing the design plans for installation of cable in the City Hall Annex. It would be ideal if we could have Continental design staff develop and install the link to the Commerce Building at the same time. Therefore I would appreciate knowing as soon as possible whether it will be possible to use the conduit, and whether any specific written agreements are necessary. If permission is granted, I would also like to know the appropriate City person for Continental staff to work with on the designing and installation of the link.

Thank you for your assistance.

cc: Tom Eggum

PLAINTIFF'S EXHIBIT 1022

CITY OF SAINT PAUL
DEPARTMENT OF FINANCE
AND MANAGEMENT SERVICES

[SEAL]

GEORGE LATIMER
MAYOR

LINDA J. CAMP

Office of Cable Communications
901 Commerce Building
8 East 4th Street
Saint Paul, Minnesota 55101

(612)298-5095

TO: Dick Behr

FROM: Linda Camp /s/ Linda Camp
Cable Communications Officer

DATE: April 8, 1987

RE: Wiring of the Commerce Building

After some discussions with some of our Traffic engineers, we have discovered that there is a nearly empty conduit running from the City Hall Annex building to the basement of the Commerce Building. The conduit is under the control of our Traffic Division and looks like a very good way to provide service to the Commerce Building. It appears that this link could be easily included in the design to connect City Hall and City Hall Annex via the Water Utility tunnel under Fourth Street.

I have contacted Don Sobania of Public Works for permission to use the conduit. I will keep you posted on our progress. In the meantime, I have attached a rough map showing the approximate location of the conduit for your information.

cc: Lee Afflerbach

(3)

Supreme Court, U.S.
FILED
MAY 28 1991
OFFICE OF THE CLERK

No. 90-1653

In The

Supreme Court of the United States

October Term, 1990

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP,

Petitioner,

vs.

CITY OF ST. PAUL and CONTINENTAL CABLEVISION OF ST. PAUL, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the District Court properly ruled that petitioner lacked standing to pursue its alleged constitutional claims based upon the jury's special verdict findings and its own review of the record.

2. Whether the Eighth Circuit used the appropriate standard in reviewing the credibility determinations made by the jury's special verdict findings.

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BRIEF IN OPPOSITION

Respondent City of St. Paul ("City") respectfully requests this Court deny the Petition of Nor-West Cable Communications Partnership ("Nor-West") for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit in this case.[1] Nor-West's Petition largely ignores the fact there was a trial, at the conclusion of which the jury and the District Court found that Nor-West lacked the ability and intent to design, build or operate a second, competitive cable system in St. Paul. On the basis of these inherently credibility-laden findings, the District Court held that Nor-West lacked standing to bring its claims challenging the City's refusal to issue a second franchise. The Eighth Circuit properly affirmed, and no reason exists for further review.

STATEMENT OF THE CASE[2]

The only proposal which Nor-West ever submitted to the City to provide cable television service was for a

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[1] The opinion and judgment of the Eighth Circuit is reported at 924 F.2d 741 (1991) (*"Nor-West III"*) and is printed in the appendix to the Petition at Appendix 1 ("Pet. App."). The District Court's Order of February 27, 1989, (*"Nor-West II"*) is printed at Pet. App. 39. The District Court's Order for Judgment, dated September 1, 1988, (*"Nor-West I"*) is printed at Pet. App. 27.

[2] The Petition contains a number of factual misstatements, most of which relate to issues other than standing – the only issue which can be presented for review given the disposition

(Continued on following page)

single, non-exclusive franchise. *Nor-West III*, Pet. App. 2; Tr. 219[3]. The City's ultimate award of that single, non-exclusive franchise to Continental Cablevision of St. Paul, Inc. ("Continental") in 1983 was later affirmed by the Minnesota Cable Communications Board and the Minnesota Supreme Court. *Nor-West III*, Pet. App. 2-3; *see Cable Communications Board v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658 (Minn. 1984).

Nor-West's proposal to the City, including its financial projections, specifically assumed that Nor-West would be the sole franchisee. Tr. 131, 167, 169-70, 447-52, 705, 717, 797, 2069, 2205-07, 2339-42, 3542. In fact, Nor-West's bank would not have funded construction of Nor-West's system had the City issued multiple franchises. Tr. 2535, 2538. This financing commitment for the single, non-exclusive franchise lapsed in 1983. *Nor-West III*, Pet. App. 11.

On September 2, 1983, Nor-West filed the present lawsuit against the City alleging, *inter alia*, equal protection and first amendment violations and requesting a jury

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(Continued from previous page)

of Nor-West's claims below. The City will limit its discussion to those facts related to standing which were omitted from or stated inaccurately in the Petition.

[3] "Tr." refers to the page of the consecutively paginated trial transcript. References to other transcripts are designated by the date of the proceeding, followed by "Tr." and the relevant page number. "R." signifies the docket number of the relevant entry in the District Court record. "PX" signifies plaintiff's exhibits; "DX", defendant's exhibits.

trial.[4] It was only after filing this suit that Nor-West's counsel requested (by letter dated December 5, 1983) that the City award a second, competing franchise[5] to Nor-West. *Nor-West III*, Pet. App. 3; PX 516; Tr. 2069, 4187. The franchise terms were to be identical to those contained in the franchise issued by the City to Continental. *Id.*; Tr. 970-71. Prior to this request, Nor-West had undertaken no investigation into either the financial viability or technical feasibility of a second cable system in St. Paul. Tr. 219, 710, 725-26, 2532, 2538.

Nor-West's partners always intended to obtain bank financing for the construction and operation of Nor-West's system. Indeed, they never even discussed building a system without such financing. Tr. 2341, 2347, 2398-99. Although Nor-West now claims that its partners could have spent "all reasonably necessary amounts" with funds drawn from the partners' collective net worth

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[4] Although now Nor-West complains that it had to choose between litigation and "complying with an apparently unconstitutional monopoly franchising scheme" (Pet. at 3-4), Nor-West never challenged the constitutionality of the City's award of a single, non-exclusive franchise until after Nor-West was denied that franchise. *See Nor-West III*, Pet. App. 19-20. Nor-West's original complaint sought the invalidation of Continental's franchise and the issuance of the single franchise to itself. R. 1. This complaint was subsequently amended to challenge the City's refusal to grant a second franchise to Nor-West to operate a cable television system on the same terms and conditions as Continental. Amended Complaint, ¶ 40, R. 33.

[5] A second, competing franchise or "overbuild" means a franchise to build a cable system throughout the City to compete head-to-head with Continental's system for subscribers.

"of $76 million" (Pet. at 5)[6], this argument ignores Nor-West's own partners' testimony about their intent to finance construction and operation of a system with highly leveraged debt.

At no time did Nor-West obtain a financing commitment from any lender for a second, competitive cable system. *Nor-West III*, Pet. App. 11. The only nominal attempt made to secure a financing commitment for a competitive system was withdrawn and later frankly characterized by one of the partners as a "subterfuge". Tr. 154-57, 4166-68. In addition, there was uncontroverted expert testimony that Nor-West could not have obtained such debt financing even if Nor-West had a connection with a major cable company or if the partnership had substantial assets. *See Nor-West III*, Pet. App. 11.

Similarly, Nor-West never showed it could have obtained a commitment from anyone to build and operate a second, competitive system in St. Paul, even if Nor-West could have obtained the necessary financing commitments. Tr. 200, 473, 3546. For example, Henry Harris, an experienced operator of cable systems whose company had originally contracted with Nor-West to construct and operate a cable system, testified he would not have been interested in building and operating a second, competitive system. *Nor-West III*, Pet. App. 11. He indicated such a project would be "doomed to failure no matter how good a management you threw at me" and likened operation of a competitive system to being "lead pilot in a

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[6] As the Eighth Circuit accurately noted, Nor-West's partners' collective net worth was $31 million at the time of its request, not $76 million. *Nor-West III*, Pet. App. 11.

kamikaze plane." *Nor-West III*, Pet. App. 11-12 (quote from testimony at Tr. 4028).

Moreover, the evidence was overwhelming that there was insufficient demand to support a second cable system in St. Paul. *See Nor-West III*, Pet. App. 12; Tr. 337, 1870, 1925-26, 1957-58, 1963-64, 3664-66, 3674, 3768-69, 3836, 3889-90, 4005, 4011, 4761-62; DX 203C, 320. Nor-West's own financial projections showed it would have been insolvent by the second year of operation if it had attempted to build and operate a competitive system. Tr. 1661, 1663-65, 1667; DX 336. There was no evidence that operation of a second cable system in St. Paul would have been a profitable venture or that Nor-West's partners would have pursued it if it were not.

At no time did Nor-West ever submit another proposal as to what kind of system it would build if given the opportunity to compete in St. Paul. Nor-West's present and former partners offered inconsistent testimony at different times as to what Nor-West was willing and able to build. Depending upon when the question was asked and of whom, the answers varied – from the system originally proposed by Nor-West, to the system proposed by Continental, to no answer at all. Tr. 182-85, 192-93, 202, 484, 4131, 4135, 4138. Indeed, Nor-West's managing general partner testified that he did not have "the slightest idea" what had been proposed in Nor-West's request for the issuance of a second franchise. Tr. 726. Significantly, the systems described by Nor-West's expert witnesses were not based on anything which had been previously proposed to the City. Tr. 207, 1608-11.

After an eight-week trial, the District Court submitted Nor-West's first amendment and equal protection claims to the jury on special verdict questions. *Nor-West III*, Pet. App. 3. Nor-West had previously insisted that the jury verdict on all legal issues was binding on the District Court's determination of the equitable claims and that the court was bound by the jury's findings. *See Nor-West I*, Pet. App. 31-32. The jury found, *inter alia*, Nor-West was *not* ready, willing nor able to design, construct or operate a second, competitive cable system either at the time of its first request or at the time of trial.[7] *Nor-West III*, Pet. App. 3, 11-12; *Nor-West II*, Pet. App. 46; *Nor-West I*, Pet. App. 33. The jury also found that Nor-West was not damaged by the City's failure to award it a second cable franchise. *Nor-West III*, Pet. App. 3-4, 19-20; *Nor-West II*, Pet. App. 40, 45-46; *Nor-West I*, Pet. App. 33, 35-36.

The District Court adopted the jury's findings. The District Court noted that "even if . . . the court was not bound by . . . the jury verdict . . . and it was necessary to independently review the record, the court . . . did so by specifically choosing to adopt the findings of the jury . . . ". *Nor-West II*, Pet. App. 43. Nor-West's claim

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[7] Nor-West argues its standing was established by virtue of the City's admission in its Answer that Nor-West was a member "of a class of persons known as cable operators." This argument highlights the paucity of support for Nor-West's position. The admission is hardly tantamount to a concession that Nor-West was ready, willing and able to design, build and operate a *second*, competitive cable system in St. Paul at any point in time. Although reiterated throughout its Petition, this "admission" was mentioned by Nor-West only once – in its statement of the case – in its brief to the Eighth Circuit.

(Pet. at 16) that the District Court did not "independently review the record" is therefore incorrect.[8]

On the basis of these findings, the District Court held that, since Nor-West was unwilling and unable to build a competitive cable system, it lacked standing to bring its constitutional claims. *Nor-West III*, Pet. App. 4; *Nor-West II*, Pet. App. 40-45; *Nor-West I*, Pet. App. 34-38. The District Court further held that Nor-West had not suffered any damages, consistent with the jury's factual findings to that effect. Additionally, the District Court ruled that Nor-West was not entitled to recover its expenditures incurred in pursuit of the single, non-exclusive franchise because "unsuccessful bidders are not entitled to recover damages." *Id.* In a comprehensive order disposing of Nor-West's post-trial motions, the District Court noted it had conducted "a lengthy and thorough review of the record," had "painstakingly examined each of the plaintiff's points of contention" and was "satisfied that the parties received a fair trial and substantial justice has been done." *Nor-West II*, Pet. App. 41, 52.

The Eighth Circuit affirmed, ruling that the District Court had applied the correct standard of review and that its rulings were not clearly erroneous. *Nor-West III*, Pet. App. 8-10, 12-13. The Eighth Circuit held: "because Nor-West was not willing or financially able to compete with Continental, we find that Nor-West was not likely to

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[8] The Eighth Circuit also recognized that, even if the District Court was required to provide a *de novo* review, "it may be that the District Court engaged in such review." *Nor-West III*, Pet. App. 9, n. 3.

benefit from the grant of a second franchise in this case, and therefore lacked standing." *Id.* at 16.

SUMMARY OF REASONS FOR DENYING THE PETITION

Nor-West fails to identify the grounds under Rule 10 on which its Petition is premised. Nor-West does not argue that the Eighth Circuit's decision conflicts with any decisions of other courts of appeal or this Court. *See* Sup. Ct. R. 10.1(a) and (c). Nor does Nor-West seriously argue that the issue of standing is "an important question of federal law which has not been, but should be, settled by this Court." *See* Sup. Ct. R. 10.1(c). Rather, Nor-West argues that this Court should render an advisory opinion regarding the appropriate regulatory treatment of the medium of cable television for purposes of the first amendment, notwithstanding Nor-West's lack of standing to bring such claims.

The Petition should be denied because the Eighth Circuit's affirmance of the District Court's decision is fully in accord with well settled authority delineating the requirements of standing. Further, the Eighth Circuit's application of a "clearly erroneous" standard of review of the District Court's ruling on standing is consistent with this Court's decisions in first amendment cases. *See Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 2696 (1989).

ARGUMENT

1. The District Court's Ruling That Nor-West Lacks Standing To Challenge The City's Refusal To Issue A Second Franchise Does Not Present Any Novel Or Unsettled Question Of Law.

The only proper issue before this Court is whether any novel or unsettled question of law is presented by the District Court's ruling that Nor-West lacked standing to challenge the City's refusal to grant a second cable television franchise. *See* Sup. Ct. R. 10; *Fay v. Noia*, 372 U.S. 391, 436 (1963); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (writ of certiorari on an equal protection claim dismissed as it was improvidently granted). As this Court has noted on other occasions: " . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice*, 349 U.S. at 79. Neither the law of standing nor the District Court's application of that law to the facts of this case present such a unique question justifying this Court's granting of Nor-West's Petition.

Nor-West's statement that standing is an "illusive concept" which is "incapable of precise definition" both trivializes the standing requirement and is at odds with the very cases cited in the Petition. Standing is "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party

desires to have adjudicated." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 476 (1982). On the contrary, standing is an integral element of the Article III limitation on the jurisdiction of federal courts. *See Allen v. Wright*, 468 U.S. 737, 750-52 (1984); *Bender v. Williams Port Area School District*, 475 U.S. 534, 541 (1986).[9] *See also, Whitmore v. Arkansas*, 495 U.S. ___, ___, 110 S.Ct. 1717, 1726 (1990). Indeed, "a federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore*, 495 U.S. at ___, 110 S.Ct. at 1723; *Warth v. Seldin*, 422 U.S. 490, 508, 518 (1975).

This Court has routinely stated that, at an "irreducible minimum", standing requires a showing that (1) an injury in fact occurred (*i.e.*, it is concrete both qualitatively and temporally; distinct and palpable; and not merely abstract, conjectural or hypothetical); (2) the injury can be "fairly traced to the challenged action"; and (3) the injury "is likely to be redressed by a favorable decision." *Valley Forge*, 454 U.S. at 472; *Whitmore*, 495 U.S. at ___, 110 S.Ct. 1713. Unless a claim satisfies each of these crucial elements, no standing will be found.

In this case, Nor-West's first amendment and equal protection claims challenged the City's decision not to award a second, competing franchise to Nor-West "to operate a cable television system . . . *on the same terms and conditions as Continental* . . . ". Amended Complaint, ¶ 40, R. 33 (emphasis added). Nor-West was given every

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[9] Furthermore, standing "must exist at all stages of the proceeding". *Safir v. Dole*, 718 F.2d 475, 481 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206 (1984).

opportunity to offer credible evidence to support its claim that it had both the intent and ability to build and operate a second, competitive cable system in St. Paul. In the final analysis, Nor-West simply failed to persuade the jury or the District Court that it would or could have done so at any point in time.

Specifically, the jury found that Nor-West did not have the financial ability necessary to design, construct and operate the cable system which it requested permission to build (Special Verdict Finding Nos. 1, 5), was not capable of obtaining and providing the technical capability to design, construct and operate such a system (Special Verdict Finding Nos. 2, 6), and would not have built such a system given the opportunity (Special Verdict Finding Nos. 3, 7) – either in 1983 or at the time of trial. The jury's findings with respect to Nor-West's lack of intent and ability and the absence of any damage flowing from the City's refusal to grant a second franchise demonstrate that Nor-West did not suffer some actual or threatened injury as a result of the City's conduct.[10]

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[10] Although the jury found that Nor-West incurred $265,000 in expenses in seeking the single franchise originally issued by the City, those expenses were not recoverable. *See* Special Verdict Finding No. 10; *Nor-West I*, Pet. App. 29, 36; *Nor-West II*, Pet. App. 45-46. As the Eighth Circuit noted: "[i]f Nor-West does not request damages for the denial of a cable monopoly, Nor-West cannot now obtain damages on that basis. Accordingly, we find that Nor-West cannot recover money spent before it decided to compete with Continental instead of supplanting it as a cable monopolist." *Nor-West III*, Pet. App. 20.

Following an exhaustive and "painstaking" review of the record, the District Court adopted these findings and entered its order ruling that Nor-West lacked the necessary standing to pursue its claims. *Nor-West II*, Pet. App. 41, 45-46, 52; *Nor-West I*, Pet. App. 32, 35-38. After reviewing that same evidence, the Eighth Circuit concluded that the District Court's findings were not clearly erroneous. *Nor-West III*, Pet. App. 10-19. None of these rulings present any novel or unsettled questions for this Court to review.[11]

2. The Eighth Circuit's Application Of A "Clearly Erroneous" Standard Of Review Was Both Appropriate And Consistent With This Court's Rulings.

The Eighth Circuit correctly applied the "clearly erroneous" standard of review to the District Court's decision on the issue of standing, noting that "[a]s a rule, factual determinations relating to standing must be upheld on appeal unless they are clearly erroneous." *Nor-West III*,

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[11] The other rulings of the District Court and Eighth Circuit which Nor-West challenges in its Petition need not be addressed as they do not relate to the dispositive issue of standing. *See* Pet. at 21-25, 29-30. Nor-West unsuccessfully raised these same arguments before the District Court on its post-trial motions and the Eighth Circuit on appeal. Both courts properly rejected each of these arguments on grounds that they did not relate to the issue of standing. *See Nor-West III*, Pet. App. 20-22 (discovery orders), 22-23 (special verdicts and jury instructions), 24 (excluded expert testimony), 24-26 (exclusion of indemnity agreement and dismissal of Continental). *See also Nor-West II*, Pet. App. 44-45, 49 ("Many of the allegations of the plaintiff need not be addressed as they go to the substance of the plaintiff's case."), 50-52.

Pet. App. 9, *citing Pulido v. Bennett*, 848 F.2d 880, 888 (8th Cir. 1988), *rev'd on others grounds on rehearing*, 860 F.2d 296 (8th Cir. 1988); and *Hope, Inc. v. County of DuPage*, 738 F.2d 797, 803 (7th Cir. 1984) (applying "clearly erroneous" standard of review to standing determination in case involving fourteenth amendment claim). The Eighth Circuit rejected Nor-West's argument that *Bose* requires a *de novo* review on *all* issues arising in first amendment cases, including the procedural issue of standing:

> *Bose* and similar cases involve substantive determinations as to whether the plaintiff's speech is protected by the first amendment. By contrast, the district court's factual determinations in this case [*Nor-West I* and *II*] involve the procedural issue of standing. Accordingly, we hold that *Bose* is distinguishable and find that even in a first amendment case, factual determinations related to standing should be reviewed under the "clearly erroneous" standard.

Nor-West III, Pet. App. 10.[12]

In its Petition, Nor-West asks this Court to review the fact finder's credibility determinations *de novo*.[13] Such

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[12] Even in *Bose*, this Court emphasized that not every fact in a case raising constitutional issues is a "constitutional fact" requiring independent review. 466 U.S. at 514, n. 31; *see also The Bible Speaks v. Dovydenas*, 81 B.R. 750, 758 (D. Mass. 1988), *aff'd sub nom, In Re The Bible Speaks*, 869 F.2d 628 (1st Cir.), *cert. denied*, 110 S.Ct. 67 (1989).

[13] The only case relied upon by Nor-West in support of this proposition was decided two years before this Court's decision in *Harte-Hanks*. *See* Pet. 29, citing *Tavoulareas v. Piro*, 817 F.2d 762, 776-77 (D.C. Cir. *en banc* 1987), *cert. denied*, 484 U.S. 870 (1987).

independent review is not required of every facet of a constitutional action. In *Harte-Hanks* this Court expressly emphasized that appellate courts must leave undisturbed, unless clearly erroneous, the fact finder's determinations of credibility. 109 S.Ct. at 2696 and n. 35. Neither the jury nor the District Court decided the merits of Nor-West's first amendment claim. Rather, the jury's findings that Nor-West was not ready, willing and able to build or operate a second, competitive cable television system were based on a review of voluminous evidence introduced during the course of a lengthy trial. In arriving at its findings, the jury was required to make numerous credibility determinations, as was the District Court. Because these findings were not clearly erroneous, they should be left undisturbed. *See Harte-Hanks; Hope, Inc.*, 738 F.2d at 803.

3. This Court Should Summarily Reject Nor-West's Request For An Advisory Opinion On The Appropriate Scope Of Municipal Franchising Of Cable Television.

Nor-West urges this Court to "provide authoritative guidance in an area of continuing tension between" a municipality's power to franchise and the first amendment rights of cable operators generally. *Compare* Pet. 17 with Pet. 27-29. Unable to satisfy the requirement of standing, Nor-West asks this Court to issue an advisory opinion regarding the constitutional limits on municipal franchising of cable television.

Nor-West made a similar plea to the District Court, asking that the jury be instructed regarding what the City could require – before Nor-West was called upon to prove

what it was capable of and willing to do. This argument ignores the fact that Nor-West's challenge was limited to the City's refusal to issue a franchise "to operate a cable television system . . . on the same terms and conditions as Continental". Amended Complaint, ¶ 40, R. 33. No relief of any kind was sought regarding any of the franchise requirements. Indeed, Nor-West expressly disavowed any facial constitutional challenge to the franchise ordinance (*e.g.*, 8/14/86 Tr. 34-35).[14]

Nor-West's argument is both analytically contorted and beside the point. Taken to its logical conclusion, it would require courts to reach the merits of claims prior to determining whether or not the plaintiffs ever had standing to assert them. Such a result completely eviscerates the requirements of standing, reading Article III entirely out of the Constitution. It was incumbent upon Nor-West to prove what it proposed to build and operate in St. Paul and whether it could have done so. The jury found that Nor-West failed to meet this burden. As the Eighth Circuit observed: "[t]he question of what sort of system the City could have required Nor-West to build is not dispositive if, as the jury found, Nor-West did not intend to build a competitive cable television system and was

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[14] Nor-West is therefore estopped from altering its position at this juncture. *Cf. Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 737 (8th Cir. 1987); *see also Murray v. Silverstein*, 882 F.2d 61, 66 (3d Cir. 1989); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 495 (1988). Furthermore, even if it were not estopped from doing so, Nor-West cannot raise such a claim for the first time on appeal. *See Hall v. Gus Constr. Co., Inc.*, 842 F.2d 1010, 1017 (8th Cir. 1988).

unable to operate 'the cable television system it has requested permission to build'." *Nor-West III*, Pet. App. 21-22, quoting *Nor-West I*.

Nor-West now asks this Court for the advisory opinion that the District Court declined to issue. For over a century, this Court has rejected such requests. Succinctly stated:

> [this Court] is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.

Liverpool, New York and Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39, 5 S.Ct. 352, 355 (1885). This Court has consistently adhered to this principle of judicial restraint. *See Bowen v. Roy*, 476 U.S. 693, 724 (1986)("consistent with our long-standing principles of constitutional adjudication, we should decide nothing more than is actually necessary to dispose of the precise dispute before the Court, and nothing more than is fairly presented by the record and the factual findings.") (Stevens' concurring opinion); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985); *Valley Forge*, 454 U.S. at 474-75 ("in addition, even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances' ", quoting from *Warth*, 422 U.S. at 499-500); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979) ("the judiciary seeks to avoid deciding questions of broad social import where

no individual rights would be vindicated"); *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 569 (1947); *Coffman v. Breeze Corp.*, 323 U.S. 316, 324-25 (1945). Nor-West's invitation to ignore over a century of precedent against the issuance of advisory opinions should be summarily rejected.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Dated this 28th day of May, 1991.

Respectfully submitted,

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No. 90-1653

In The

Supreme Court of the United States

October Term, 1990

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP,

Petitioner,

vs.

CITY OF ST. PAUL and CONTINENTAL CABLEVISION OF ST. PAUL, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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Petitioner, Nor-West Cable Communications Partnership submits this reply in support of its petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

THE PETITION RAISES NOVEL AND IMPORTANT ISSUES FOR DETERMINATION.

Petitioner submits that several important, unsettled issues are presented for determination by this case, thus justifying grant of the Petition. These issues include clarification of the "independent review" required in free speech cases[1] (including whether the district court, as well as the appellate court, must conduct such a review in a jury case)[2], and whether "standing" to obtain judgment in an action is appropriately determined by submitting to the jury special verdicts questioning whether a potential First Amendment speaker actually desires to engage in the speech for which authorization is sought, and declining to rule upon the merits if the jury responds in the negative.

However, the issue of the greatest import raised by this case is the question of First Amendment limitations on municipal power over cable television. Petition at

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[1] *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

[2] *Compare*, the decision of the Eighth Circuit below (App. 1, pp. 8-9), with *Reveley v. Berg Publications, Inc.*, 601 F.Supp. 44, 46 (W.D. Tex. 1984); *Brown & Williamson Tobacco Corp. v. Jacobson*, 644 F.Supp. 1240, 1245 (N.D. Ill. 1986), *aff'd in part, and rev'd in part, on other grounds*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988).

16-21. In particular, this case presents a fully developed factual record upon which to assess the validity of "contractual franchising" of cable television and to set forth the appropriate boundaries on municipal power to limit the number of cable television speakers.[3]

The Damage to Individual Constitutional Rights

Petitioner contended below, and continues to contend before this Court, that the individualized selection procedure utilized by the City, designed to result in a negotiated contract with one and only one cable speaker, and with no further authorizations issued, is inconsistent with First Amendment principles. Rather, Petitioner contends, the City should seek to meet all of its legitimate interests through the enactment of non-discriminatory requirements, applicable to all would-be cable television operators. *See, Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1409 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986) ("the City must content itself with uniformly applying to all applicants regulations tailored to minimize the burden on public resources and granting

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[3] *Compare, Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) ("economic scarcity" rationale sufficient basis for City to issue only one cable franchise) with *Century Federal, Inc. v. City of Palo Alto*, 648 F.Supp. 1465 (N.D. Cal. 1986) (contra). *See also, Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (economic scarcity not permissible basis for regulation of the press); *Leathers v. Medlock*, ___ U.S. ___, 113 L.Ed.2d 494, 502 (1991) (cable television is engaged in speech under the First Amendment, and is, in much of its operation, part of the "press").

franchises to all cable operators who are willing to satisfy the City's legitimate conditions.").

An individualized selection process such as was utilized by the City of St. Paul places the local governmental body in the position of choosing which speaker is "best" by evaluating numerous subjective items (App. 12, pp. 222-25), specifically including programming information (*id.*, pp. 250-64). Moreover, the auction-type procedure utilized is designed to extract contractual commitments (*id.*, pp. 193-94) from the cable speaker ultimately selected as meeting the desires of the City (*id.*, pp. 189-94, 197-98, 199-200, 202-09, 212-15). The City's franchising document makes it quite clear that the City will not select a would-be cable speaker who objects to any of the City's "desired" items. Thus, prospective cable speakers are presented with a choice: either agree to all municipal demands, whether constitutional or not, or forever lose the opportunity to engage in cable speech. The contractual element tends to add permanence to the constitutional defect. *See, Paragould Cablevision v. City of Paragould, Arkansas*, 930 F.2d 1310, 1314-15 (8th Cir. 1991) (by entering into franchise agreement, cable company bargained away free speech rights and cannot later assert them).

Bearing in mind the never-ending "needs" of local government for funds and facilities, and the almost universal desire of local elected and appointed officials to avoid public criticism by the device of influencing the press, the contractual franchising process effectively mandates the denial of First Amendment rights to thousands of incumbent cable operators, and to all those who could

otherwise enter the field and provide competition in the commerce of cable television.

The Damage to the Democratic Process

Because cable television does clearly involve electronic publishing, the "commerce" of cable television necessarily involves the "commerce of ideas", and those ideas include reporting and comment about those seeking electoral offices and the bureaucracy created and controlled by those elected. No other medium has the capacity to report on and about local government and local affairs comparable to that of cable television; and, conversely, no other medium, when it is so motivated, has a comparable capacity to create local "name recognition" and "charisma" for those who would be anointed by the ballot box.

The existing contractual franchising process not only denies the public the benefit of fair reporting and comment, but rewards those incumbent monopoly cable operators who become toadying image makers for local functionaries by allowing them to share in the monopoly profits resulting from the artificial barriers to competition.

The print medium provides Pulitzer prizes for those who expose malevolence in government. The National Cable Television Association provides Ace awards for those whose product is designed to "puff" the public perception of local functionaries with saccharine sweet coverage.

There are few ills of the cable industry that cannot be cured with competition. The first step towards the realization of that competition is to remove the artificial barriers created by local government.

This case provides that opportunity.

PETITIONER DOES NOT SEEK AN ADVISORY RULING

Far from requesting an "advisory opinion", as suggested by the brief in opposition, Petitioner seeks a ruling on the merits of its claims *because* it believes that consideration of the merits demonstrates the incorrectness of the lower court's rulings denying it standing in this action. That is Petitioner's concern. The Court's concern, Petitioner suggests, may be to utilize this case and the exhaustive trial record underlying it, to settle the conflicting decisions on the First Amendment and municipal franchising of cable television.

Petitioner requested a ruling on the constitutionality of the City's franchising requirements from both the District Court and the Court of Appeals, and now presents that request to this Court, for an obvious reason: If, as Petitioner believes, many of the requirements which the City obtained through its contractual franchise with Continental cannot constitutionally be imposed upon Nor-West, that would dramatically affect the cost of Nor-West's potential system. This, in turn, would have had (and should have had) a direct impact upon the evaluation by the jury and/or the District Court as to Petitioner's intent and ability to finance and construct

such a system.[4] This is particularly significant given the phraseology of Petitioner's original requests to the City for a second franchise, which sought authorization "on terms at least as favorable as the terms and conditions of the franchise recently issued by the City to Continental Cablevision . . . ", *but* noted that Petitioner was offering only "to meet the lawful requirements contained in the franchise issued to Continental Cablevision." App. 16, pp. 429-30; *id.*, pp. 431-32.

At trial, counsel for the City repeatedly mischaracterized Petitioner's requests as proposals to build a system identical to Continental's. *See, e.g.*, App. 11, pp. 175, 176, 179, 179-80.[5] Yet, the key to Petitioner's requests was their caveat as to the lawfulness of any terms and conditions imposed by the City. By failing to provide guidance to the jury as to the lawfulness of those requirements, and by itself adopting the jury's special verdict responses as its own findings of fact without ever reaching the merits of the lawfulness of those requirements (App. 2, p. 5), the District Court in essence simply excised this critical caveat from the case. A ruling on the merits of Petitioner's

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[4] *Compare, e.g.*, the closing argument to the jury by the City's counsel, excerpted in Appendix 11 to the Petition, wherein it is noted that the system design proposed by Petitioner's trial experts under the assumption that at least some of the City's impositions on Continental would not be required of Nor-West, ranged in cost from $19 million to $25 million (App. 11, p. 180), compared to the $43.5 million cost incurred by Continental (*id.*, p. 176).

[5] Indeed, the City continues to make the same mischaracterizations to this Court. Brief in Opposition at 3.

claims, if at least partly in Petitioner's favor, would likely lead directly to injunctive relief and/or a damage award depending upon reassessment of the facts once constitutional limits are known.

In short, the constitutionality of the City's restrictions on cable speech *was* properly at issue below and is properly before this Court. The decisions below, which denied Petitioner standing without considering the issue in the context of proper constitutional limits on City franchising were erroneous. While this Court *could* grant this Petition and remand the matter for proper consideration by the District Court or the Court of Appeals, with guidance from this Court (Petition at 2, ¶5), the Court could also determine that this case is an appropriate one to resolve unsettled and conflicting questions relating to municipal franchising and regulation of cable television speech.

THE BRIEF IN OPPOSITION MISCHARACTERIZES PETITIONER'S POSITION BELOW AND MISSTATES CERTAIN EVIDENCE.

A. The Brief in Opposition incorrectly states: "As the Eighth Circuit accurately noted, Nor-West's partners' collective net worth was $31 million at the time of its request, not $76 million. Nor-West III, Pet. App. 11." Brief in Opposition at 4 n.6. This assertion is flatly incorrect, both as a characterization of the Eighth Circuit opinion and in fact.

The accurate facts are set forth in the Petition (Petition at 5) and the Eighth Circuit opinion (App. 1, p.11). Petitioner's net worth in 1983 *was* $76 million. However, due to the long delay and significant expense in bringing

the action to trial[6], by the time of the 1988 trial several partners had withdrawn. The remaining partners still had net worth of about $31 million in 1988. RT 110, 4153. Further, at least one of the former partners testified as to his willingness to rejoin the partnership if authorization to build a competing cable system could be obtained. RT 2398.

B. The Brief in Opposition incorrectly describes Petitioner's challenge below as

> limited to the City's refusal to issue a franchise "to operate a cable television system . . . on the same terms and conditions as Continental." Amended Complaint, ¶40, R. 33.

Brief in Opposition at 15.

The quoted portion is taken from Petitioner's equal protection cause of action, which did indeed focus upon the City's differential treatment of similarly-situated cable television operators (*i.e.*, a franchise was issued to Continental, but not to Nor-West). However, the Brief In Opposition omits reference to the allegations contained in the First Amendment cause of action. In particular, ¶53 of the amended complaint notes objection to the numerous requirements extracted by the City through its auction franchising process. App. 10, p.118.

C. The Brief in Opposition asserts that "Nor-West expressly disavowed any facial constitutional challenge to the franchise ordinance (*e.g.*, 8/14/86 Tr. 34-35)." *Id.*

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[6] By the time of trial, Petitioner had spent in excess of $1.5 million on the lawsuit. RT 162.

(footnote omitted). At best, this assertion is grossly misleading. The transcript excerpt relied upon relates only to a single, narrow position, *i.e.*, that neither the Minnesota Cable Communications Act (Minn. Stat. ch. 238 (1983)), nor the Federal Cable Communications Policy Act of 1984 (47 U.S.C. §521 *et seq.*) *mandated* exclusive franchising, and hence were not facially invalid *on that ground. See, Preferred Communications, Inc. v. City of Los Angeles, supra,* 754 F.2d 1411 n.11. Rather, Petitioner's challenge below was (and remains) focused upon the procedures utilized and requirements imposed by the City of St. Paul in issuing (and refusing to issue) cable television authorizations. As a factual matter, the City had made the decision to issue only a single franchise in 1982 (RT 1217, 1285-87). Since the extensive (and in Petitioner's view, largely unconstitutional) requirements imposed upon Continental were imposed through a contractual agreement rather than through generally-applicable ordinances (*see,* Appendix 12 at 193-94), and because the City refused to inform Petitioner of the requirements which the City would seek and/or demand from Petitioner in issuing a second cable authorization, it remained unclear what "requirements" were even relevant to Petitioner's desires. Nor-West envisioned the solution to this dilemma being an injunction requiring the City to issue authorization to Petitioner with whatever requirements the City believed appropriate, followed by particularized Court review of those requirements as appropriate.[7]

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[7] *See, Century Federal, Inc. v. City of Palo Alto,* 648 F.Supp. 1465, 1478-79 (N.D. Cal. 1986) (court holds monopoly franchising unconstitutional), *later decision,* 710 F.Supp. 1552 (N.D. Cal.

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Unfortunately, as is detailed in the Petition (Pet. 9-14, 21-24), the trial court "put the cart before the horse" by denying Petitioner standing based upon special verdict responses provided without judicial guidance as to which of the requirements imposed on Continental could validly be imposed upon Petitioner.

D. The Brief in Opposition asserts that Petitioner's original complaint "sought the invalidation of Continental's franchise and the issuance of the single franchise to itself." Brief in Opposition at 3 n.4. Once again, this statement is misleading at best. The original complaint specifically prayed that Continental not be issued a franchise "unless and until a CATV franchise is granted to the plaintiffs." App. 9, p.102. Obviously, Petitioner was not demanding issuance of a monopoly franchise.

CONCLUSION

For the foregoing reasons, Petitioner requests issuance of a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. Dated this 18 day of June, 1991.

Respectfully submitted,

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1987) (court subsequently reviews the major requirements that cities sought to impose on all cable franchisees).